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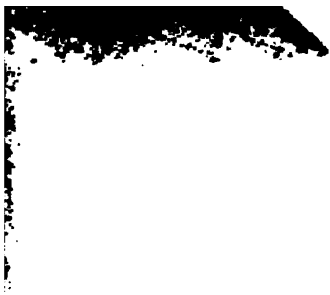
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CASES IN BANKRUPTCY,

BY

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OF LINCOLN'S INN, BARRISTER AT LAW, AND COMMISSIONER OF BANKRUPTS,

AND

ROBERT S. JAMESON, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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DECIDED BY LORD CHANCELLOR ELDON,

AND BY

VICE CHANCELLOR SIR JOHN LEACH,

From Michaelmas Term 1821, to the Sittings before

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ADVERTISEMENT.

These Reports are a Continuation of the Work of the late Mr. BUCK, and the Cases in this Volume, preceding STANLEY GODDARD's Case, are from the Notes of that Gentleman.

*Lincoln's Inn,
Michaelmas Term, 1824.*

CASES

IN

BANKRUPTCY.

Ex parte BARBER.—In the matter of SHAW. LING. INN,
Jan. 31,
1821.

PETITION to supersede for want of a petitioning creditor's debt. The husband alone may sue out a commission upon a promissory note given to the wife *dum sola*.

The commission issued on the petition of the husband alone, upon a promissory note of the bankrupt given to the wife *dum sola*. The wife had not joined in the affidavit made on striking the docket.

The cases of *Rumsey v. George*, 1 M. & S. 177, and *M'Neilage v. Holloway*, 1 Barn. & Ald. 218 (a), were cited.

(a) The decision in this case seems to have proceeded on the ground, that a bill of exchange, being transferable by law, and the right of action shifting with the possession of it, is to be considered, not as a chose in action, but rather as a chattel personal, vesting in the husband by the act of marriage.

1821.

The VICE CHANCELLOR.

Ex parte
BARBER.
 In the matter
 of
SHAW.

In the case of *McNeilage* and *Holloway*, where, before coverture, goods had been sold by the wife, and a promissory note given to her, payable to her order, the court of King's Bench decided, that the husband might bring an action upon it in his own name. It appears to me to follow, that, if he can bring an action upon it in his own name, he can petition upon it in his own name for a commission against the debtor.

Mr. *Montagu* for the petition.

Mr. *Wakefield contra.*

Petition dismissed without costs.

LINC. INN,
 Jan. 31,
 1821.

Ex parte **SCHOLEY.**—In the matter of
GREENWAY.

Though a case appear, in which the court would, upon an immediate application, vacate the choice, on account of an improper rejection of proofs, yet it will not interfere, where there is delay in making the application.

PETITION By several creditors for the removal of the assignee, and for a new choice.

In pursuance of a previous arrangement, a deed of composition, bearing date the 28th of July, 1819, was signed by *Greenway* and all his creditors, except the petitioning creditor, and promissory notes were given, by *Greenway* and a surety, to the creditors who signed, for the payment of their debts by instalments; the commission issued on the 15th of July, 1819; and the 16th of August, 1819, was appointed for the choice of assignees. On that day, the peti-

tioners, whose debts were to a considerable amount, applied to prove; but their proofs were rejected by the commissioners, on the grounds that they had, since the commission, taken promissory notes for their debts, none of which notes were due, and that the notes were not excepted in their affidavits of debt; and the petitioning creditor, whose debt was £126, being the only creditor who had proved, chose himself sole assignee. After the rejection of their proof a negotiation was entered into and carried on for some time, between the bankrupt and the petitioners, respecting a composition of 5s. 6d. in the pound upon their debts.

1821.

Ex parte
SCHOLEY.
In the matter
of
GREENWAY.

On the 20th of January, 1820, the bankrupt passed his last examination; and it was not till after the last examination that this petition was presented.

Mr. Cullen and *Mr. Rose* for the petition.

Mr. Montagu against it.

THE VICE CHANCELLOR.

To the general rule, that the choice of assignees will not be disturbed on account of the mere error of the commissioners in the rejection of debts, there may be cases of exception. But parties who complain of such error, must bring forward that complaint with all reasonable diligence. These petitions come too late at the end of six months.

Petition dismissed with costs.

LINC. INN, *Ex parte* WILMSHURST and BROOKS.—In the
 Jan. 17, matter of WIGNEY and SEYMOUR.
 1821.

Where a commission is superseded at the costs of the petitioning creditors, and some of them pay the whole costs, the court has no jurisdiction in bankruptcy to order the rest of the petitioning creditors to contribute.

ON the 7th of January, 1818, this commission issued on the petition of *George Hounsom, Thomas Eames, James Bigwood, William Field, John Baxter, John Francis Prior, William Baxter, Thomas Wilmshurst, and William Brooks*; *James Champ* was solicitor to the commission.

In March, 1818, Messrs. *Hodges* presented a petition to supersede the commission, at the expense of the petitioning creditors, and of the said *James Champ* and of *Richard Dally*, gentleman; and in August, 1818, that petition was heard by his Honor the Vice Chancellor, who directed an issue to try the validity of the commission; and on the trial of that issue, the petitioning creditors, who were plaintiffs, being unable to prove their debt, were nonsuited.

In May, 1819, Messrs. *Hodges*, presented a second petition, stating the result of the issue, and praying, that the commission might be superseded, at the expense of the petitioning creditors, and of the said *Richard Dally* and *James Champ*; and that the petitioning creditors, and the said *Richard Dally* and *James Champ*, might be directed to pay the petitioners the costs of their former petition, and of that application, and of the trial of the issue, and of the proceedings consequent thereon: which last-

mentioned petition was heard before his Honor the Vice Chancellor, in August, 1819, when an order was made according to the prayer, and the commission was superseded accordingly; and the costs were taxed at £720:1:9.

1821.

Ex parte
WILMSHURST
and BROOKS.
In the matter
of
WIGNEY
& SEYMOUR.

The costs not being paid, in January, 1820, the said Messrs. *Hodges* obtained the usual order, that the petitioning creditors, and *Richard Dally* and *James Champ*, some or one of them should, within four days after personal service, pay the sum of £720:1:9, or be committed; and should also pay the costs of that application.

Under that order, *Thomas Wilmshurst* and *William Brooks* were committed to the Fleet; but were released from thence, upon their paying the sum of £802:2:11, the amount of taxed costs up to the time of the last order being obtained, and giving an undertaking to discharge the subsequent costs, which they subsequently paid, to the amount of £38:18:4.

In June, 1820, *Thomas Wilmshurst* and *William Brooks* presented the present petition, stating the above circumstances; and praying that the said *George Hounsom*, *Thomas Eames*, *James Bigwood*, *William Field*, *John Baxter*, *John Francis Prior*, *William Baxter*, and *James Champ*, might be ordered each to pay to the petitioners his share and proportion of the costs paid by the petitioners, and the costs of that application; and the last mentioned petition was heard before his Honor the Vice Chancellor, in August, 1820, when an objection was taken to the jurisdiction; and the Vice Chancellor expressed an opinion, that

1821. the court could make no order upon the petition; but desired that it might stand over till the next day of petitions, that the counsel for the petitioners might have time to consider the objection.

Ex parte
WILMSHURST
and BROOKS.
In the matter
of

WIGNEY
& SEYMOUR.

Jan. 17,
1821.

This day the petition came on again, when Mr. Hart and Mr. Montagu for the petitioners, referred to the cases *ex parte Bernal*, 11 Ves. 557; *ex parte Hartop*, 9 Ves. 109, and 12 Ves. 349; *ex parte Smith*, 5 Ves. 706; *ex parte Fector, Buck*, B. C. 428; *ex parte Cowan*, 3 Barn. & Ald. 123; and pressed upon the court, that they were entitled to be relieved upon petition, on the principle, that whatever has been done in the bankruptcy, may be undone in the bankruptcy.

The VICE CHANCELLOR said, that his difficulty did not turn upon the commission being superseded. If the commission were subsisting, would the court, determine in bankruptcy the equities which might arise, where many persons were ordered to pay costs to another, as to the proportions in which they ought to contribute between themselves. This question of contribution appeared to him to be altogether collateral to the bankruptcy, and must be the subject of an action at law, or a bill in equity, for an apportionment (u).

(a) The jurisdiction of the Chancellor, in bankruptcy, continues for many purposes after the commission is superseded; as, to compel assignees to repay to a purchaser of the bankrupt's estate his deposit, *ex parte Fector, Buck*, B. C. 428; to restore to the owner property wrongfully seized under the commission, and to give him compensation in value for such property, *ex*

Mr. *Roots* for *Thomas Eames*.

1821.

Mr. *Wetherell*, Mr. *Rose*, and Mr. *Tinney*, for various parties.

Ex parte WILMSHURST and BROOKS. In the matter of WIGNEY & SEYMOUR.

Ex parte STONES and another.—In the matter of LINC. INN, BARKE and LANGTRY. Feb. 1, 1821.

IN July, 1820, a separate commission of bankrupt The petitioning creditor to a separate commission against *Joseph Barke*, upon the petition of *John Lidster* the elder; and *John Lidster* the elder was chosen assignee under that commission. A, will not be compelled to attend, in order to give evidence in support of a subsequent joint commission against the same party and his copartner.

In September, 1820, a joint commission of bankrupt issued against the same *Joseph Barke* and *William Langtry*, his copartner.

Upon the opening of the joint commission, *John Lidster* the elder was summoned to attend as a witness, before the commissioners under that commission. He refused to attend: and the petitioning creditors

parte Cowan, § Barn. & Ald. 123; *Ves.* 558; *ex parte Warren*, 1 *Ross*, 276, 19 *Ves.* 162; and generally to undo what has been done in the bankruptcy, *ex parte Fector*, *Buck*, B. C. 428; and see the case of *Wright v. Mitchell*, 18 *Ves.* 293; *Lingard v. Bromley*, 1 V. & B. 114; *Hart v. Biggs*, 1 *Holt*, 245.

to enforce payment of the messenger's bill, by the assignees, *ex parte Hartop*, 9 *Ves.* 109; or by the petitioning creditor, *ex parte Johnson*, *infra*; or by the solicitor, *ex parte Hartop*, 12 *Ves.* 353; to order the production and deposit of the proceedings, *ex parte Bernal*, 11

1821. under the joint commission, being unable to prove an act of bankruptcy by *Joseph Barke*, without the evidence of *John Lidster* the elder, presented this petition; praying, that *John Lidster* the elder might be ordered to attend, and be examined before the commissioners. The grounds of the refusal of *John Lidster* the elder to attend the commissioners under the joint commission, in order to give evidence as to an act of bankruptcy by *Joseph Barke*, were, that he was a creditor of *Joseph Barke*, and that he ought not to be compelled to give evidence to destroy his separate commission.

Ex parte
STONES and
another.
In the matter
of
BARKH
& LANGTRY.

Mr. *Wetherell* and Mr. *Rose* for the petitioners.

Because a man takes out a separate commission, he shall not be protected in saying, I will not prove the act of bankruptcy under a joint commission. A commission is for the interest of all: there is no separate title in bankruptcy. The commission is that of all the creditors for their joint benefit. The application is merely to supply the defective jurisdiction of the commissioners. The objections made are not preliminary objections to the attendance of the witness. They may be taken before the commissioners. A creditor may be ordered to attend. *Ex parte Gouldie* (a), *ex parte Gardiner* (b). Supposing his evidence not admissible, or not sufficient to prove the act of bankruptcy, why may he not be examined for the purpose of discovery as to what others can prove.

Mr. *Bell* and Mr. *Gardiner contra*.

(a) 2 *Rose*, B. C. 330.

(b) 1 *Ves.* and B. 78.

The VICE CHANCELLOR was of opinion, that the petitioning creditor to a subsisting commission, could not be compelled to be a witness to destroy his own proceedings. 1821.

Ex parte
STONES and
another.
In the matter
of
BARKE
& LANGTRY.

Petition dismissed with costs,

Ex parte HUSTLER.—In the matter of GOOD-CHILD and others. LINC. INN,
Feb. 24,
1821.

THE facts of this case, and the judgment of the Vice Chancellor, are stated in *Buck*, B. C. 170, and 3 *Mad.* 117. Six persons are in partnership as bankers, under two firms, J. and W. J. two of them carry on a distinct trade.

This was an appeal from the judgment of the Vice Chancellor, so far as it went to establish the proof of *Thomas Gowland*, against the estate of *John and William Jackson*, in respect of the bill of £493. G accepts a bill for J. & W. J. and in exchange they deliver to him, at the same time, a bill, to the same amount, drawn and accepted by the six, but not indorsed by J. and W. J. Held, it was a purchase by G, and that G, having paid his acceptance, and the bill he received being dishonored, was not entitled to prove the amount against J. and W. J.

The LORD CHANCELLOR

(After reading the petition). There were three partnerships. The parties in the firm at Bishop-Wearmouth, are the same as in the London firm: the London firm are mere agents of the Bishop-Wearmouth house. A commission having issued against the six, the minor partnership might be provided for, under our usual arrangements in bankruptcy.

Gowland, before the commission, was indebted to *John and William Jackson* in the sum of £191 : 1 : 1. *Gowland* accepts a bill for £493, drawn by *John and William Jackson* upon him. The question is,

1821. whether this acceptance of *Gowland*, was not in consideration of another bill drawn by *Goodchilds, Jacksons, and Co.*, upon *Jacksons, Goodchilds, and Co.*, indorsed by several persons, and delivered to *Gowland*, by *John and William Jackson*, but not indorsed by them. The point is, what was the consideration for *Gowland's* acceptance; and it is an intricate and important question. If nothing more had passed than the acceptance of the bill, had *Gowland* accepted for the accommodation of *John and William Jackson*, he would have been entitled to prove against them: but, at the same time, they put into his hands another bill, for the same sum, not drawn, accepted, or indorsed by them, but drawn by *Goodchilds, Jacksons, and Co.* on *Jacksons, Goodchilds, and Co.*; and, at the same moment, the interest is settled as between the two bills becoming due at different times. The question is, whether this is not an exchange of paper; whether *Gowland* was not to look for payment by the bill put into his hands. It is not immaterial, that *Gowland* proved against *Jacksons, Goodchilds, and Co.* the bill accepted by them; and in his affidavit, stated that he had received no satisfaction or security, and that the consideration was money advanced; and in a sense it was, after he had paid his own bill. I cannot get rid of the opinion I have formed, that it was a purchase by *Gowland*, and that the consideration of his acceptance was, the bill he took at the time.

Ex parte
HUSTLER.
In the matter
of
GOODCHILD
and others.

With respect to the bill for £853, there should be a declaration, that *Gowland* is to stand as trustee for *John and William Jackson*, of what he shall receive on that bill, after he has been paid 20s. in the pound upon his debt, and the order must be so varied.

The following order was made :

1821.

Now upon hearing the said petition read, &c., I do declare, that as to so much of the said proof made, by the said *Thomas Gowland*, against the estate of the said *John* and *William Jackson*, as is constituted of the said bill for £493:1:6, the same ought to be varied and reduced, by expunging the amount of such last mentioned bill from the account, making the debt or balance to be proved by the said *Thomas Gowland*, the sum of £342:5:7 only. And I do hereby refer it back to the commissioners named in the said commission, to review and alter the said proof accordingly: and as to the other bill for £853:4:2, also included in the said balance so proved, I do declare, that, in case the said *Thomas Gowland* shall at any time have received 20s. in the pound upon his said debt of £342:5:7, he shall thenceforth stand as a trustee for the estate of the said *John* and *William Jackson*, for the amount of any dividends received, or to be afterwards received by him, in respect of the said bill, from any other of the parties, whose names are on the said bill, over and above the amount of 20s. in the pound on his said debt. And I do order that the assignees of the said *John* and *William Jackson*, be at liberty to retain their costs out of the said estate of the said bankrupts.

Ex parte
HUSTLER.
In the matter
of
GOODCHILD
and others.

ORDER.

LINC. INN,
Feb.
1821.

Ex parte OXLEY.—In the matter of GRIBBLE.

A petition to
supersede, must
contain an alle-
gation that the
petitioner is a
creditor.

THIS was a petition to supersede; and upon its being opened, Mr. *Rose*, for the petitioning creditor, interposed a preliminary objection, that it did not contain any allegation, that the petitioner was a creditor.

Mr. *Heald*, for the petitioner, insisted, that the fact of the petitioner being a creditor appearing by the affidavit in support of the petition, was sufficient.

The VICE CHANCELLOR.

All material facts must be alleged as well as proved.

Let this petition stand over, with liberty to amend, by inserting the necessary allegation.

LINC. INN,
April, 11,
1821.

Ex parte HODGSON.—In the matter of COOK.

A mortgagee,
with a power of
sale, may apply
to the court to
have the pre-
mises sold.
Assignees not
permitted to bid
in their private
character.

BY an indenture of mortgage of the 17th of June, 1817, certain leasehold premises, situate at Shadwell Market Hill, in the parish of Shadwell, Middlesex, belonging to one *Edward Gifford*, were assigned to the petitioner, for securing the sum of £200, advanced by him to the said *Edward Gifford*, subject to redemption on payment of that sum and interest on the 17th of June, 1820, and with power to the petitioner to sell the premises, in default of payment thereof.

By an indenture, bearing date the 30th of September, 1818, the premises were assigned by *Edward Gifford* to the bankrupt, for the residue of the term therein, subject to the mortgage.

1821.

Ex parte
Hobson.
In the matter
of
Cook.

In June, 1819, the bankrupt borrowed of the petitioner the sum of £250, and at the time of the loan, wrote and signed a paper writing in the following words ; —

“ As I am entitled to the benefit of any surplus, which may remain of the produce of the sale of the piece or parcel of ground, messuage, or tenement, and premises, situate in Shadwell Market Hill, assigned by *Edward Gifford* to you, by indenture dated 17th June, 1817, I authorize you to act and sell, and pay yourself, out of that surplus, the sum of £250, which is due from me to you, with lawful interest for the same, from the date hereof, for cash advanced to me on account of my interest in the said premises.”

The petitioner, claiming by virtue of that paper writing, as equitable mortgagee of the said premises, in respect of the £250, prayed by this petition, that the said paper writing might be declared a valid equitable mortgage; a reference to the commissioners to ascertain what was due to him in respect of the said securities; that he might be at liberty, under the power of sale, to put up the premises to sale by auction; and that the produce might be applied in payment of the said two sums of £200 and £250, and interest; and the surplus, if any, paid over to the assignees.

It was contended by *Mr. Agar*, for the assignees,

1821. that the petition, praying for a sale of the premises under the power, was wholly unnecessary, as the petitioner might sell without the assistance of the court.

Ex parte
Hobson.
In the matter
of
Cook.

The VICE CHANCELLOR was of opinion, that the mortgagee might waive the special power of sale in the deed, and come for a sale in his general character of mortgagee.

Mr. *Horne* asked, that the petitioner might be at liberty to bid at the sale.

The VICE CHANCELLOR said, the petitioner might bid, if the sale was before the commissioners, and conducted by the assignees.

Mr. *Agar* asked, that the assignees might be allowed to bid in their private character.

The VICE CHANCELLOR.

I never will make such an order without very special circumstances.

LINC. INN,
April 13,
1821.

Ex parte HOUGHTON.—In the matter of
HOUGHTON.

The solicitor employed by the bankrupt to procure his certificate, neglecting to obtain the signature of the commissioners to the certificate, which had been long before signed by the proper number of creditors, ordered to deliver up the certificate and affidavits to the bankrupt, and to pay the costs of the application.

THIS was the petition of the bankrupt, and it stated, that the commission issued on the 13th of February, 1815, and that, within eighteen months after that time, his certificate of conformity was signed by three-fifths of his creditors, and the proper affidavits of the signatures made, and the certificates and affidavits lodged

in the hands of the solicitor, whom the petitioner had employed to procure his certificate, for the purpose of obtaining the signature of the commissioners, but that, notwithstanding many applications by the petitioner to the solicitor to procure the signature of the commissioners, the solicitor had, under various pretexts, constantly neglected to procure the same, and the petitioner offered, if it should appear, that the solicitor had not been already paid or covered in point of expense, to pay his costs and charges: the petition therefore prayed, that the solicitor might immediately procure the signature of the commissioners, and the allowance of the Lord Chancellor; or otherwise that he should deliver up the certificate and affidavits to the petitioner, in order that he might procure the signatures of the commissioners, and the allowance of the Lord Chancellor, and that the solicitor might pay the costs of the application.

1821.

Ex parte
HOUGHTON.
In the matter
of
HOUGHTON.

The solicitor did not appear.

Mr. *Rose* for the petitioner, stated, that the petitioner's father would undertake to pay the solicitor any costs that might be due to him in respect of the certificate.

The VICE CHANCELLOR made the order that the solicitor should deliver up the certificate and affidavits to the petitioner, upon the petitioner and his father undertaking to pay what should be found due to the solicitor on the taxation of his bill of costs; and that the solicitor should pay the costs of the application.

LINC. INN, *Ex parte* GREEN.—In the matter of HARRIS.
 April 15,
 1821.

Affidavits sworn
 before the clerk
 of the solicitor
 to the com-
 mission not al-
 lowed to be
 read.

MR. MONTAGU made a preliminary objection to the hearing of this petition, that the affidavits in support of it had been sworn before the clerk of the solicitor to the commission; and cited, *ex parte Breckhurst (a)*.

The VICE CHANCELLOR.

The principle is, that the affidavits must be taken by a person indifferent between the parties. Can the clerk of the solicitor to the commission be considered as a person indifferent between the parties, in a question whether the commission is to stand?

Affidavits not allowed to be read.

The petition was permitted to stand over with liberty to re-swear the affidavits.

Mr. Heald for the petition.

Mr. Hart and *Mr. Montagu contra*.

(a) 1 *Ross*, B. C.

Es parte GRANT and another.—In the matter of
PARK the younger.

LINC. INN,
May 2,
1821.

THIS was a petition by two creditors of the bankrupt, one of whom was an assignee, to supersede the commission, on the ground, that it was the bankrupt's commission, and had been issued by the petitioning creditor in concert with the bankrupt and the solicitor who sued it out.

It is an invariable rule, that a commission taken out at the instance of the bankrupt cannot be supported, however hostilely it may be prosecuted.

Several affidavits were filed for and against the petition.

The VICE CHANCELLOR was of opinion, upon the affidavits, that the commission had been taken out by the petitioning creditor, at the instance of the bankrupt.

It appeared, that the bankrupt, in a conversation with the petitioning creditor, shortly before the docket was struck, stated, that he expected that the assignees of *Minchin's* estate would take out a commission against him, in which case, he expressed his apprehension, that one *Lang*, who was hostile to him, would be appointed assignee, and he therefore urged the petitioning creditor to make him a bankrupt. The petitioning creditor took out the commission, and *Lang*, together with the petitioner *Grant*, were chosen assignees.

The VICE CHANCELLOR.

This point first occurred before me, in the case of
VOL. I. c

1821. *Staff* in the matter of *Saunders* (a), and it then appeared to me, that, where the commission was legal, and the administration was proceeding in a manner beneficial to the creditors, it was questionable, whether it would be a sound exercise of the discretion of the Great Seal, to prejudice the creditors by the delay and expense, which must be the consequence of a new commission, merely because the commission had originally issued at the instance of the bankrupt.

Ex parte
GRANT and
another.
In the matter
of
PARK the
younger.

I afterwards learnt, that the case of *ex parte Staff*, was reheard before the Lord Chancellor, and that the subject presented itself to his Lordship's mind in a different point of view; and for that reason, when the present case was argued, I declined to make any order in it, until I had the opportunity of a further communication with the Lord Chancellor upon the subject, in order that some certain principle might be established. The result of that communication is, that, although in a case like the present it is undoubtedly injurious to the creditors of the particular commission, that it should be superseded, yet, considering that, as the law stands, the commission is given as a remedy to the creditor, and not to the bankrupt; and that it is against the spirit and principle of the law, that the bankrupt should procure a commission to be issued against himself, it is therefore fit, as a measure of general policy, to adopt as an invariable rule, that no commission can be permitted to stand,

(a) *Buck*, B. C. 249.

which, though it may be good at law, has been issued 1821.
at the solicitation of the bankrupt (a).

Ex parte RAWLINSON.—In the matter of
RAWLINSON.

LINC. INN,
May 17,
1821.

A PRELIMINARY objection was taken to this Petition which
petition, that the signature of the petition was not pro- purported
perly attested, as required by the general order (b). "in the pre-
sence of Thos.
Lee, Master
Extraordinary
in Chancery,"

The petition purported to be signed by the peti- Extraordinary
tioner, *Robert Rawlinson*, "in the presence of in Chancery,"
Thomas Lee, a Master Extraordinary in Chancery." permitted to
stand over, for
the purpose of
amendment,
and of an affi-
davit being
filed to shew,
that Lee was, at
the time of the
signature, the
petitioner's soli-
citor or agent;
the petitioner
paying the costs
of the day.

Mr. Wetherell and *Mr. Wilbraham* for the petition.

The VICE CHANCELLOR.

If you think you can make out, that, at the time of his signature, *Lee* was actually the solicitor or agent of the party signing, I will permit this petition to stand over, with liberty to amend the attestation, the petitioner paying the costs of the day. Other-
wise, the petition must be dismissed with costs.

Mr. Agar, *Mr. Montagu*, and *Mr. Barber* for the assignees.

(a) See *ex parte Prosser, Buch*, to applications by assignees to
B.C. 77. *Ex parte Brookes, Ibid*, supersede.
137. *Ex parte Staff, Ibid*, 431. (b) August 12, 1809.
and *Ex parte Graves, infra*, as

LINC. INN, *Ex parte* BECKWITH and others.—In the matter of
 May 23, HENRY HALL and JOHN HALL.
 1821.

Bankrupts
 should be de-
 scribed in the
 commission ac-
 cording to their
 legal or known
 description.

Where the
 bankrupts were
 described, as
 of "Sun Wharf,
 London, and
 Wolverhampton," they hav-
 ing no residence
 or establish-
 ment at Wol-
 verhampton;
 commission
 superseded.

THIS was a petition to supersede the commission, on the ground of a misdescription of the bankrupts. The bankrupts were described, in the commission, as of Sun Wharf, Upper Thames-street, in the city of London, and also of Wolverhampton, in the county of Stafford, iron merchants, dealers, and chapmen. The bankrupts had never resided, nor had any house of business, at Wolverhampton.

The petition prayed, that the commission might be superseded, at the cost of the petitioning creditors; and that a new commission might issue on the petition of the petitioners.

By the affidavits in opposition to the petition, it was stated, that *Henry Hall* had written a letter to the petitioning creditor, dated Wolverhampton, April 7, 1821, begging his attendance at a meeting of the creditors of the bankrupts, to be held at Sun Wharf; and that the solicitor, who sued out the commission, having been led by that letter to believe that the bankrupts had some establishment, or carried on some trade, at Wolverhampton, had been induced to add the words, "and also of Wolverhampton," to the description of the bankrupt in the commission.

Mr. Montagu for the petition.

In the case *ex parte Horsley* (a), there was no

(a) 2 *Mad.* 11, and see the cases cited in the note to that case.

doubt, that the bankrupt was of the place of which he was described in the commission. The bankrupt's letter does not intimate that he had any dealings at Wolverhampton. *Laidlow's case* (a).

1821.

Ex parte
BROOKWITH
and others.
In the matter
of
HENRY HALL
and
JOHN HALL:

Mr. Cullen and Mr. Rose contra.

This is the first case, in which the court has been called upon to decide, that mere surplusage, in matter of description, will vitiate a commission.

The VICE CHANCELLOR.

I must refer the decisions which have taken place upon this point to this principle, that the bankrupt must be named in the commission according to his legal or known description. The addition of Wolverhampton is no part of the legal or known description of these bankrupts, and the commission must therefore be superseded. I cannot consider that to be mere surplusage which tends to create doubt and confusion as to the identity of the bankrupts.

Ordered to be superseded at the costs of the petitioning creditors, and a new commission to issue upon the petition of the petitioners.

This order was appealed from, by the petitioning creditors, and this day the petition of appeal came on to be heard. June 23,
1821.

Mr. Hart and Mr. Montagu.

A new commission has since issued, describing the bankrupts as of Sun Wharf only. Will not the court

(a) 2 *Rose*, 246.

1821. support the last commission, which is unquestionably good. *Gordon's case (a)*. *Needham's case (a)*.

—
Ex parte
BECKWITH
and others.
In the matter

The LORD CHANCELLOR.

of
HENRY HALL,
and
JOHN HALL.

I should like to know when the new commission issued: after the Vice Chancellor has made an order for superseding a commission, which order is appealed from, no new commission ought to issue. I sign every order for a *supersedeas*; but every order for a *supersedeas*, which I make upon the judgment of the Vice Chancellor, is without prejudice to any appeal to me (b). When the office of Vice Chancellor was created, it occurred to me, that the Vice Chancellor could not use the Great Seal; and it was settled, that the Vice Chancellor pronounces his judgment, and the Lord Chancellor makes the order, as if the petition had been heard before him, and he had superseded it; but the party is to have his remedy by appeal. The prayer of the petition of appeal ought to have been, not only that the order of the Vice Chancellor should be reversed, but that a writ of *procedendo* should issue. In the case of *Laidlow (c)*, there were two commissions; the bankrupt-office was bound to issue the second commission: so here, if they had gone to the bankrupt-office before the application to the Great Seal, the office would have been bound to issue a second commission.

I think, the order for superseding the commission is right; but, on the question of costs, it is not immaterial, that the petitioning creditor says, the

(a) 2 *Mad.* 13, in note.

Buck, B. C. 45. in note.

(b) See the form of that order,

(c) 2 *Rosc.* B. C. 246.

CASES IN BANKRUPTCY.

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commission was taken out from apprehension of an extent. 1821.

Order confirmed, so far as related to the superseding of the commission, and issuing a new commission. The costs to be paid out of the joint estate of the bankrupts.

Ex parte
BECKWITH
and others.
In the matter
of
HENRY HALL
and
JOHN HALL.

In the matter of ____ .

LINC. INN,
July, 5,
1821.

MR. ROSE applied to supersede this commission on the part of the petitioning creditor. The commission had been sealed but not opened.

Commission sealed but not opened, not supersedeable at the instance of the petitioning creditor without notice to the bankrupt.

The VICE CHANCELLOR thought the bankrupt must be served with the petition. And the petition stood over to serve the bankrupt.

Ex parte JOHNSON.— In the matter of
CATTERSON.

LINC. INN,
April 13, &
July 23,
1821.

THIS was a petition, by the messenger under the commission, for the payment of his costs.

Petitioning creditor ordered to pay the messenger his costs as taxed by the commissioners, and the assignees to pay his subsequent costs, where the commission

The petition stated the issuing of the commission on the 8th of June, 1819, and the adjudication of the bankruptcy; and that on the 10th of June, 1819, the commissioners executed to the petitioner a provisional

was supersedeable, and was considered as superseded.

1831. assignment of the bankrupt's effects ; that the petitioner took possession; that the assignees were chosen on the 21st of June, 1819; that the petitioner, by the desire of the commissioners, retained possession until the 24th of July then following, when his bill of costs as messenger was taxed by the commissioners at the sum of £37 : 6 : 4; and that the petitioner continued in possession, at the request of the assignees, until the 10th of August following, and his demand subsequent to the taxation was £8 : 10 : the petition prayed, that the solicitor and the petitioning creditor, or one of them, might pay him the taxed costs, and that the assignees might be ordered to pay the subsequent costs.

Ex parte
Johnson.
In the matter
of
CARRISON.

It appeared, that the bankrupt had succeeded in an action against the commissioners, for the purpose of trying the validity of the commission; that a petition had been presented to supersede the commission; and that the effects of the bankrupt taken under the commission had been restored to him.

Mr. *Horne* and Mr. *J. Martin* for the petition, cited *ex parte Hartop*, 9 Ves. 109.

The VICE CHANCELLOR.

The case of *ex parte Hartop* has decided, that although the commission is superseded, and the assignees have possessed no effects, the messenger may, upon petition, have an order for payment of his bill subsequent to the choice of assignees. Upon that authority, I shall make the order for payment of the subsequent costs by the assignees.

The other point, as to the taxed costs, is new. The

CASES IN BANKRUPTCY.

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petitioning creditor is, by the express direction of the 5 Geo. II., to pay all costs and expenses of suing forth and prosecuting a commission, until the assignees are chosen; he is therefore personally bound to pay the messenger. And I wish it to be considered, whether, where the commission is at an end, the messenger can call upon the court to enforce his demand against the petitioning creditor by petition, or must not proceed against him by action at law.

1821.
—
Ex parte
JOHNSON.
In the matter
of
CATTERSON.

The petition was dismissed as against the solicitor, and the rest of the petition stood over.

On this day the petition was again mentioned, and the Vice Chancellor then ordered, that the assignees should pay the sum of £8: 10, being the subsequent costs, and the costs of so much of the petition as related to that sum, and that the petitioning creditor should pay the sum of £37: 6: 4, the taxed costs, and the rest of the costs of the petition (a).

July 24.

Ex parte SOLOMON.— In the matter of
AUBUSSON.

LINC. INN,
July 23,
1821.

THE object of this petition of the assignee was to compel Mr. *Heath*, a solicitor, who had proved under the commission, to deliver up, for the benefit of the

A creditor, having a lien on property of the bankrupt for his debt, held to be concluded by proving his debt, voting in the choice of assignees, and signing the certificate, and ordered to deliver up the property on which he had a lien.

(a) *Ex parte Hartop*, 1 *Ross*, B. C. 450.

1821, bankrupt's estate, a patent which had been obtained
 — by the bankrupt, or to have the value of the patent
Ex parte ascertained, and the proof expunged or reduced *pro*
 SOLOMON. *tanto*.
 In the matter of
 of
 AURUMON.

The bankrupt, previous to the issuing of the commission, had obtained a patent for making "aid forms," which had come into the possession of *Heath*, who had prosecuted the patent for the bankrupt. *Heath* proved a debt of £271 : 2 : 7, for monies laid out and expended by him as solicitor of the bankrupt, and for money lent to the bankrupt, including in his proof, the costs and charges of prosecuting the patent, without deducting the value of the patent, or offering to give it up, and he had also voted in the choice of assignees, and signed the bankrupt's certificate upon the amount of his proof. *Heath* claimed a lien on the patent for the debt he had proved.

The only question was, whether *Heath*, having proved, and voted in the choice of assignees, and signed the bankrupt's certificate, was bound to abide by his proof and deliver up the patent, or was still at liberty to retract his proof, and resort to the patent, in satisfaction of his debt *pro tanto*.

Mr. *Rose* for the petition mentioned *ex parte Hornby* (a).

Mr. *Montagu* for *Heath*.

THE VICE CHANCELLOR.

Where the creditor has done acts, by virtue of his

(a) *Buck*, B. C. 351.

proof, which may affect the interest of others, he cannot retract his proof. The signing of the certificate by him may have influenced others to sign.

1821.

Ex parte
SOLOMON.
In the matter
of
AUNUSON.

Mr. Montagu.

In the case *ex parte Atkinson* in the matter of *Blackburn*, (a) which was a stronger case than the present, the Lord Chancellor permitted the assignee to reduce his debt. There the assignee had signed the certificate, and the next signature was of the Bank of England, who had expressly declared, they never would sign, unless the assignee signed. The debt of the Bank was £16,000, and would at once have turned the certificate. I argued it upon the principles now laid down by your Honor, but the Lord Chancellor decided against me.

The VICE CHANCELLOR.

There must have been specialties in that case. The signing of the certificate is an act affecting the interests of the rest of the creditors, and the party must abide by his proof and deliver up the patent (b).

Ordered accordingly.

(a) 20 Feb. 1821.

• B. C. 96. S. C. 18. Ves. 290.

(b) *Ex parte Downes*, 1 Ross,

LINC. INN, *Ex parte PRIDEAUX and others.*—In the matter
July 24,
 1821. of SYMES.

Where a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill of costs taxed, if the bankrupt, at the time of his bankruptcy, was not concluded.

THE commission issued upon a debt of £108:12:7, stated to be due to the petitioning creditor, as the balance of a bill of costs, for business done by him, as the solicitor of the bankrupt. This was the petition of certain creditors of the bankrupt to have the bill of costs taxed; and it prayed, that in case it should appear upon the taxation, that there was not a sufficient sum remaining due, to constitute a valid petitioning creditor's debt, the commission might be superseded, at the costs of the petitioning creditor, and a new commission issue on the petition of the petitioners.

The petitioning creditor had proved his debt for a dividend, and neither the bankrupt nor the assignees made any objection to the charges in the bill of costs.

The taxation of the bill of costs was opposed by Mr. Hart and Mr. Cullen for the solicitor, on the ground, that it was not a matter of right, for any creditor to have the bill of costs taxed, where the bankrupt and assignees were satisfied.

The VICE CHANCELLOR.

If at the time of the commission the bankrupt was not concluded from the taxation of this bill, then it is fit it should now be taxed; and every creditor has an interest in the taxation, more especially, if the validity of the commission is to depend upon the amount (a).

(a) *Ex parte Howell*, 1 Rose, B. C. 312.

CASES IN BANKRUPTCY.

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The bill of costs ordered to be taxed by the master. 1821.
The rest of the petition to stand over.

Mr. *Montagu* and Mr. *Roots* for the petition.

Ex parte
FRIDMAN
and others.
In the matter
of
SYMES.

Ex parte **STRUTT.**—In the matter of **HIGTON**
and **BREWER.**

LINC. INN,
July 24,
1821.

PETITION to consolidate the estates of the partner-
ship and of *Higton*.

A meeting of the joint and separate creditors had
been called by advertisement, and the creditors,
present at the meeting, had agreed to the consoli-
dation.

The court will
not order a con-
solidation of
bankrupt's es-
tates without a
reference;
though in pursu-
ance of a resolu-
tion of creditors
at a meeting
called for that
purpose.

The VICE CHANCELLOR.

The resolution of the creditors, at the meeting
called for that purpose, forms a sufficient reason why
the court should refer it to the commissioners to in-
quire, if the consolidation proposed is for the general
benefit: but the court will not, upon such a resolution
alone, bind the interest of the absent creditors of both
classes.

Ordered to be referred to the commissioners ac-
cordingly.

Ex parte *Sheppard* *Reeve* *et al.* 415.

LINC. INN, *Ex parte* BURLTON.—In the matter of ABITHOL.
 July 24,
 1821.

The court will not restrain commissioners in their examinations, upon an allegation, that the object of the examinations is to procure evidence against the parties examined, as to penalties incurred by gaming.

THIS petition stated, that the petitioner was informed and believed, that the commission had been issued at the instance of the bankrupt, for the purpose of using the same, in order to sustain actions at law against the petitioner and other persons; and, by the means of such commission, to examine the several persons, against whom such actions were brought, and thereby extort, if possible, evidence to support the said actions. That, at the instance of *Joseph Carter*, the assignee, and the bankrupt, the commissioners caused one *Thomas Hefferson* to be examined before them, touching certain transactions, alleged to have taken place, between the said *Thomas Hefferson*, the petitioner, and the bankrupt, and other persons; and, that during such examination, the bankrupt was present, and instructing the solicitors for the assignee and their counsel, to examine the said *Thomas Hefferson*. That the object of *Joseph Carter* and the bankrupt, in the said examination, was to obtain evidence, against the petitioner and other persons, of unlawful gaming, in order to fix them with penalties. That, after the examination of the said *Thomas Hefferson*, and, on the 29th of January, the bankrupt and *Joseph Carter* caused an action at law to be commenced against the said *Thomas Hefferson*, the petitioner, and other persons, to recover a debt alleged to be due to the said *Joseph Carter*, as such assignee; and caused the petitioner, and the other persons to be held to bail in the said action, for the sum of £690. That the peti-

tioner had put in bail to the said action, and intended to defend the same; that the petitioner was informed and believed, that *Joseph Carter*, as such assignee, had brought actions at law against other persons, who had been examined before the commissioners; that the petitioner had been served with a summons, under the hands of the commissioners, to attend at a private meeting, to be examined; and that the petitioner believed the object of the examination was to obtain evidence from the petitioner, in order to sustain the action at law so commenced against him, and for the other purposes aforesaid. The petition therefore prayed, that the commissioners might be restrained from examining the petitioner, touching the alleged debt of £690, or any other matter relating to the said action at law; and that the petitioner might be examined upon interrogatories, to be exhibited to the petitioner, in writing, and might have fourteen days time to answer the same.

1821.

—
Ex parte
BURLTON.
In the matter
of
ARITHOL.

Mr. Cullen and Mr. Montagu for the petitioners.

Though, in general, the court will not interfere, there are exceptions; the case of *ex parte Innes* (a), recognizes the principle upon which the court has interfered; and the object of these examinations is to found criminal proceedings. Commissioners ought not to lend themselves to procuring evidence. We charge that the commission issued for an improper purpose; but, if the commission is superseded, the proceedings will remain.

THE VICE CHANCELLOR.

The object of this petition is, that the general authority, which the law gives to the commissioners,

(a) *Buck*, B. C. 337.

1821. to examine persons for the discovery of the bankrupt's estate, may, in this particular case, be restrained; and the reason given is, that the petitioner may by *Ex parte* **BURLTON.** his examination be made subject to penalties. A party is only made subject to penalties, where money is unfairly won at play: and I can neither assume, that the commissioners will not do their duty; nor that the petitioner will not find a sufficient protection in the rule of law, which enables him to refuse to answer questions tending to criminate him, or to expose him to penalties (a).

Petition dismissed with costs.

LINC. INN, *Ex parte* **BUCKLE** and others.—In the matter of *July 25,* **GIBSON** and **PEACOCK.**
1821.

The proof of a debt, though by the 49 G. 3. c. 121, s. 14, a conclusive election to adopt the commission, does not affect the remedies of the party proving for the recovery of his debt unpaid, in cases within the 5 G. 2. c. 30, s. 9. **BY** this petition, the facts of which were not disputed, it was stated, that, in March, 1811, *Peacock* was the owner of one-fourth part of a vessel called the *Mary Ann*, and that one *Middleton* was the owner of the remaining three-fourth parts thereof; that, in March, 1811, *Peacock* and *Middleton* fitted out the vessel for a voyage, and shipped a cargo of goods on board, and that the petitioners were creditors of *Peacock* and *Middleton*, for £1790:5, for premiums of insurance paid by them, upon insurances effected on the vessel and her cargo, and for goods sold; and there were an order to prove under a second commission, in which 15s. in the pound was not paid, held to be entitled to prove their debts unpaid under a third commission.

(a) *Ex parte Bland*, 1 Atk. 205.

other joint creditors of *Peacock* and *Middleton* to a large amount: that, in February, 1813, a commission of bankrupt issued against *Middleton*, under which he was duly declared bankrupt; that, in November, 1813, a commission of bankrupt issued against *Peacock*, (being a second commission against him), under which he was duly declared bankrupt; that *Peacock* obtained his certificate under the said second commission, in January, 1814; and, in April, 1814, a dividend of 5s. in the pound was made under the last mentioned commission, which dividend exhausted all the effects of the bankrupt under the same: that, in April, 1815, *Peacock* became entitled to divers real and personal estates as the heir at law and personal representative and one of the next of kin of his uncle; that the petitioners conceiving, that such property would pass to the assignees under the said second commission, they, together with certain other joint creditors of *Peacock* and *Middleton*, presented a petition in *Peacock's* bankruptcy, on behalf of themselves and the other joint creditors of *Peacock* and *Middleton*, for permission to prove their debts against *Peacock's* estate, and that they might receive the said dividend of 5s. out of the first funds received, and any future dividends with the separate creditors of *Peacock*, and an order was made upon that petition according to the prayer; that, on the 20th of April, 1815, this commission issued against *Gibson* and *Peacock*, under which they were duly declared bankrupts; that the petitioners, subsequently to the presenting the said petition and the order thereon, discovered, that the assignees under the last mentioned commission had possessed themselves of all the property of *Peacock* derived from his uncle, and in

1821:

Ex parte
BUCKLE
and others.
In the matter
of
GIBSON
and
PEACOCK.

1821.
Ex parte
 Buckle
 and others.
 In the matter
 of
 GIBSON
 and
 PEACOCK.

consequence thereof, the petitioners and the other joint creditors of *Peacock* and *Middleton*, had declined proving their debts, in pursuance of the order; and that there never was any joint estate of *Peacock* and *Middleton*. The petition, therefore, prayed, that the petitioners and the other joint creditors of *Peacock* and *Middleton*, might be permitted to prove upon the separate estate of *Peacock*, under the commission against *Gibson* and *Peacock*, and might receive dividends rateably with *Peacock's* separate creditors.

Mr. *Bell* and Mr. *Collinson* for the petition.

Upon the authorities of *ex parte Baker* (a) and *ex parte Hodgkinson* (b), a third commission may issue, notwithstanding that 15s. in the pound is not paid under the second commission; and property coming to the bankrupt subsequent to the certificate under the second commission, vests in the third assignees. This property, by the 5 G. 2, c. 30, s. 9, is subject to the claims of the creditors under the second commission, and the question here is, how those, who have come in under the second commission, are to avail themselves of it. We say, that, as this property is to be divided under the third commission, we have a right to prove under it.

Mr. *Wilson* and Mr. *Roots*, for the assignees, contended, that the petitioners, having obtained an order to prove under the second commission, had made their election, and were precluded from proving under the

(a) 1 *Ross*, B. C. 452. (b) 2 *Ross*, B. C. 172. 19 *Ves.* 294.

third commission, by 49 G. 3, c. 121, s. 14, and they cited *Read* and *Sowerby*, 3 *Mau.* and *Sel.* 78.

1821.

Ex parte
BUCKLE
and others.
In the matter
of
GIBSON
and
PEACOCK.

The VICE CHANCELLOR was of opinion, that the 14th section of the 49 G. 3. c. 121, meant only, that the fact of proof should be a conclusive election to proceed under the commission, and did not touch the ultimate remedies which were given to creditors who fully adopted the commission; and that the creditors under the second commission, by reason that 15s. in the pound was not paid, being enabled to proceed by action against the bankrupt, for the purpose of charging his subsequent estate, though not his person, were equally entitled to prove their debts unpaid under the third commission.

The petitioners and the other joint creditors of *Peacock* and *Middleton*, allowed to prove, upon the separate estate of *Peacock*, under the commission against *Gibson* and *Peacock*.

Ex parte HAYNES.—In the matter of
RING.

LINC. INN,
July 28,
1821.

PETITION by the solicitor to the commission praying, that the assignees might be ordered to pay his bill of costs, up to the choice, as taxed by the commissioners.

Application by the solicitor for payment by the assignees, having assets, of his bill of costs up to the choice, as taxed by the commissioners. The provision in the statute 5 G. 2. c. 30.

The assignees were chosen on the 26th of September 1820, and in the November following, the bill was taxed by the commissioners.

s. 25, for taxation of the petitioning creditor's costs on the day appointed for the choice, is merely directory.

1821.

The assignees had possessed sufficient effects.

Ex parte
HAYNES.In the matter
of
RING.Mr. *Hart* for the petition.

Mr. *Beames* for the assignees, contended, that, even if the solicitor was at liberty to apply to the court for payment by the assignees of his bill when taxed by the commissioners, yet that, in this case, the bill not having been taxed on the day appointed for the choice of assignees, was not properly taxed pursuant to the 5 G. 2, c. 30, s. 25.

The VICE CHANCELLOR.

The provision in the statute, that the commissioners shall ascertain the costs of the petitioning creditor on the same day that the assignees are chosen, is merely directory, and it cannot have been the intention of the legislature, that the petitioning creditor should not be reimbursed, unless all his costs and expenses were ascertained on that day. My difficulty here is of another kind. By the language of the statute the petitioning creditor is to bear all costs and expenses until the assignees are chosen, and is afterwards to be reimbursed out of the effects of the bankrupt. The demand of the solicitor, therefore, is properly upon the petitioning creditor, and not upon the assignees: and, if the solicitor is allowed to petition, the messenger must also be allowed to petition, and, then, not only will the estate of the bankrupt be burthened with the expense of two petitions, instead of one by the petitioning creditor, but this difficulty will arise, that the petitioning creditor may have made payments to the solicitor or messenger, and will not be before the court upon their petitions to assert that fact. For this reason, I will make no order upon this

petition, without first taking the opinion of the Lord Chancellor upon this point (a). 1821.

No order made (b).

Ex parte
HAYNES.
In the matter
of
RING.

Ex parte CUNDALL. In the matter of SMITH. LING. INN,
July 30,
1821.

THIS was a petition, by joint creditors, to be admitted to prove under this separate commission, and to stay the certificate. Certificate not stayed upon matter contained in affidavits in reply, where the petition and affidavits filed with it did not make a case for staying it.

The petition, which was presented in May, stated that the commission issued on the 9th of January, 1821, that the commissioners had rejected the proof of the petitioners, and that the certificate had been signed by the commissioners, and was before the Lord Chancellor for his allowance. The affidavits filed with the petition were to the same effect; but no ground was stated in the petition, or the affidavits in support of it, for staying the certificate, nor was the delay of the petitioners in making the application accounted for. Several affidavits, in answer, were filed on the part of the bankrupt, imputing wilful delay to the petitioners, and the petitioners filed affidavits, in reply, to account for their delay.

Mr Heuld and Mr. Barber for the petition, admit-

(a) *Ex parte* Clarke and Cogan, Cooke's B. L. 14, 7th Ed. *Ex parte* Hartop, 1 Rose, 450. *Ex parte* Johnson, *supra*. (b) The petition was not mentioned again, the parties having agreed.

1821.

Ex parte
CUNDALL.
In the matter
of
SMITH.

ted, that the petition and affidavits filed with it, stated no specific ground for staying the certificate: but contended, that the subsequent affidavits sufficiently accounted for the delay of the petitioners.

Mr. *Bell* and Mr. *Horne* for the bankrupt.

The petitioners have been guilty of laches. They go before the commissioners and insist upon their right to prove; they ought to have come to the court. The court, in favor of the certificate, requires all the facts to be stated in the affidavits filed with the petition. *Ex parte Curtis (a)*.

The VICE CHANCELLOR.

Upon the face of this petition, and upon the affidavit which was filed in support of it, these petitioners come too late to stay the certificate. For the purpose of explaining this delay, they have filed affidavits in reply, and the question is, whether I can permit them thus to supply the defect of their original case: and my opinion is, that I cannot: and that in a petition to stay a certificate, all material facts must be equally stated in the petition, and in the affidavit which accompanies it, so as to make a *prima facie* case for staying the certificate. I shall allow the proof, and let the certificate go (*b*).

(a) 1 *Ross* B. C. 274. C. C. 48. *Ex parte Dyson*, 1
(b) *Ex parte Adams*, 2 *Bro. Rose*, 67, note.

Ex parte WHITEHEAD, BUCKLEY, and others. **LINC. INN,**
—In the matter of KIRK and BROUGHTON. **July 30,**
1821.

PETITION for payment of a dividend. At the time B, a creditor of the bankrupts, assigns his estate and the debts due to him to trustees, in payment of his creditors, and afterwards proves his debt under the commission. Held, that the assignees under the commission were not entitled to deduct from the dividend on that proof, a sum due from B to them for costs, upon the dismissal of a bill, filed by B against them, and dismissed subsequent to the assignment and prior to the proof.

of the issuing of the commission, in November, 1810, the bankrupts were indebted to the petitioner *Buckley* in the sum of £1109:14:10. In January, 1813, a dividend of 1s. 6d. in the pound, and, in February, 1817, a further dividend of 1s. 3d. in the pound, were declared under the commission. In June, 1819, *Buckley*, being insolvent, by deed, assigned to the other petitioners, his estate and effects, and debts due to him, in trust for the benefit of his creditors. On the 8th of July, 1820, *Buckley* proved his debt under the commission; and, on the 29th of the same month, the commissioners made an order for the payment to *Buckley* of the former dividends, which, upon the debt of £1109:14:10, amounted to £152:11:9.

From this sum the assignees under the commission claimed to deduct £40:4:6, as the proportion of costs due from *Buckley* to them, upon the dismissal of a bill, which had been filed by *Buckley* and others against them, and was dismissed in April 1820.

Mr. *Rose* for the petition, contended, that there was no mutuality: that the debt and dividends were due from the bankrupts to the trustees under the deed of assignment, and the costs were due from *Buckley* to the assignees under the commission.

Mr. *Montagu* for the assignees, referred to *ex*

1821. *parte Nockold, Cooke B. L. 486. 7th Ed. to shew,*
that assignees might retain for a private debt.

Ex parte
WHITEREAD,
BUCKLEY,
and others.

The VICE CHANCELLOR.

In the matter
of
KIRK and
BROUGHTON.

Before the assignees were entitled to claim from *Buckley* this sum for costs, he had assigned his debt from the bankrupt, and, consequently, his right to dividends under the commission, to the other petitioners. I cannot set off against the dividends due to those petitioners, the personal demand which the assignees have against *Buckley*,

LINC. INN, *Ex parte NEWHAM.*—In the matter of NEWHAM.
July 31,
1821.

Half of the
dividends upon
a proof of
£500, in re-
spect of a lega-
cy to the wife
of the bankrupt,
ordered to be
paid to her
without a re-
ference.

A REVERSIONARY legacy of £500, upon the death of the testator's widow, was given to the wife of the bankrupt, who was executor, and received sufficient assets for payment of the legacy; but did not, in conformity to the directions of the will, invest that sum in the purchase of stock.

In April, 1812, the commission issued: and in April, 1814, a proof was made under the commission, by the assignees and the husband of the testator's widow, (she having married again), for the £500. The testator's widow died in December, 1818. No settlement had been made on the wife, and two dividends, to the amount of 8s. 1d. in the pound, had been declared.

This was a petition by the wife of the bankrupt, for

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payment of the dividends on the £500, or for a reference to the master for a provision thereout. 1821.

Ex parte
NEWHAM.
In the matter
of
NEWHAM.

Mr. *Wilson* and Mr. *Whitmarsh* for the petition, asked, as the fund was small, and subject, in the first instance, to the costs of the petition, that the court would order one half of the dividend on the £500, to be paid to the wife, without a reference.

Mr. *Heald* for the assignees, did not object; but was not authorized to consent.

The VICE CHANCELLOR ordered, that, after payment of the costs, one half of the residue of the dividend on the £500 should be paid to the petitioner.

Ex parte RUFFORD.—In the matter of GEORGE LINC. INN, WOOD and THOMAS WOOD. Aug. 1, 1821.

PETITION by the assignees to expunge part of a creditor, debt proved under this commission: *William Huncocks* proved a debt of £1517:2:2, upon a deposition stating, that the bankrupts were, at and before the issuing of the commission, and then were, indebted to the deponent and *John Knight* his partner, in the sum of £1517:2:2, for goods sold and delivered; for which sum of £1517:2:2, the deponent had not, nor had his said partner, or any other person or persons, to the knowledge or belief of the deponent, received any security or satisfaction, except two several promissory notes therein described, holding a bill of exchange, with the bankrupt's name upon it, proves a debt, upon a deposition, stating, that he holds the bill as security, and subsequently receives 15s. in the pound upon the bill from other parties, and 5s. in the pound upon his proof: restrained from receiving further dividends on the amount of the bill.

1821. and a bill of exchange for £600, drawn by the bankrupts upon and accepted by *Thomas Bishop*, payable to their own order, and indorsed by the bankrupts to the deponent and his partner. Messrs. *Hancocks* and *Knight* received from the petitioners a dividend of 5s. in the pound, upon the full amount of their proof, and also received from the assignees of *Thomas Bishop*, the acceptor, a dividend of 15s. in the pound, upon the sum of £600, the amount of the said bill. Since the payment of the above mentioned dividend, a farther dividend of 3s. 6d. in the pound, having been declared under the commission against *George Wood* and *Thomas Wood*, Messrs. *Hancocks* and *Knight* demanded payment from the petitioners of the said dividend of 3s. 6d. in the pound, upon the sum of £1517 : 2 : 2, the full amount of their proof; and the petitioner paid Messrs. *Hancocks* and *Knight* the last mentioned dividend of 3s. 6d. in the pound, upon the sum of £917 : 2 : 2, the residue of their debt, after deducting the bill of exchange for £600, without prejudice to any question, as to their demand for a further sum. Messrs. *Hancocks* and *Knight*, having, by means of the aforesaid dividend, received 20s. in the pound, upon the full amount of the bill for £600, this petition prayed, that the proof of the said debt of £1517 : 2 : 2, might be reduced, by expunging the proof of the sum of £600, the amount of the said satisfied bill of exchange.

Ex parte
Rufford.
 In the matter
 of
Geo. Wood
 and
Thos. Wood.

Mr. *Phillimore* for the petition, cited *ex parte Wallis*, 1 *Cooke*, B. L. 167, 7th Ed.

Mr. *Hart* and Mr. *Montagu contra.*

The VICE CHANCELLOR said, that the proof ought not to be expunged, but that the question was, whether the court would not restrain Messrs. *Hancock* and *Knight* from receiving further dividends on the £600; and that, considering that the bill having the bankrupt's name upon it, could not be sold as a general security for the whole debt, it must be taken as in payment of the particular sum of £600; and he must therefore restrain the receipt of further dividends on that sum.

1821.

Ex parte
RUFFORD.
In the matter
of
Geo. Wood
and
Thos. Wood.

Ordered accordingly (a)

Ex parte GALE.—In the matter of GALE.

LINC. INN,
Aug. 17.
1821.

PETITION by the bankrupt to supersede the commission at the costs of the petitioning creditor.

The commission issued on the 7th of June, and had been opened by the commissioners; but no adjudication of the bankruptcy had taken place.

A commission supersedeable for want of prosecution under the general order of the 26th of June, 1793, cannot be superseded by the bankrupt without a petition.

There was an affidavit, that the petitioner had not committed an act of bankruptcy.

Mr. *Beames* for the petition.

Mr. *Parker*, *contra*, contended, that the petition

(a) See *ex parte Burn*, 2 *Rose*, B. C. 55.

1821. was unnecessary, as the *supersedeas* might have been obtained as of course, upon application at the bankrupt-office, the time limited for prosecuting the commission, under Lord Loughborough's general order, having expired.

Ex parte
GALE.
In the matter
of
GALE.

The VICE CHANCELLOR, after referring to the deputy secretary of bankrupts, decided, that the commission must be superseded with costs, for that, although it was of course to any other person, by application at the bankrupt-office, to supersede a commission, supersedeable for want of prosecution under the general order, yet the bankrupt could not supersede it without a petition (a).

(a) *Ex parte Fletcher*, 1 Rose, B. C. 454.

STANLEY GODDARD'S CASE.

MICHAEL.
TERM.
1819.

THE bankrupt *Goddard* was committed by the commissioners for not answering to their satisfaction the questions put to him.

The warrant of commitment, dated the 13th of November 1819, after reciting the issuing of the commission on the 10th of June, 1819, and the adjudication of the bankruptcy, and the notice in the Gazette requiring the bankrupt to surrender; and that the bankrupt surrendered on the 19th of June, and submitted himself to be examined, but prayed time; and that on the 24th day of July, the bankrupt was again examined by the commissioners, but not being prepared to finish his examination, and requesting further time, the same was granted to him until the 17th day of August then next; and that on the 17th day of August, the bankrupt was again examined, but not being then prepared, the commissioners, at his request, adjourned his last examination until the 9th day of October; and that on the 9th day of October, the bankrupt was again examined, and upon his oath stated, that he was not prepared to pass his last examination, and that, at the request of the bankrupt, the commissioners adjourned the last examination until the 2d day of November, proceeded as follows: "And whereas the said *Stanley Goddard* did, on the said 2d day of November instant, again surrender himself to the major part of the said commissioners in the said commission named and authorised, in order to

Where the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account, and the bankrupt referred to a written account as the only mode of explaining his trade and dealings; and the last adjournment was made upon his assurance, that he would produce such account, if further time was given; held that such account not being produced, nor any satisfactory reason given for not producing it on the day to which the adjournment was made, the commissioners were justified in committing.

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—
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GODDARD'S
Case.

finish his examination, and to make a full disclosure and discovery of his estate and effects, and being then and there duly sworn and required by the major part of the said commissioners to make such disclosure and discovery, he the said *Stanley Goddard* was not able to give full and satisfactory answers to the several questions then and there put to him by the major part of the said commissioners touching his estate and effects, and thereupon, in consideration of the assignees and creditors then and there present, not pressing the continuance of the examination of the said *Stanley Goddard*, and upon his assurance, that he would make up his accounts, and be prepared to pass his last examination, upon being allowed a short time further, the major part of the said commissioners did adjourn the last examination of the said *Stanley Goddard*, until this day at ten o'clock in the forenoon, at the *Guildhall* of the said city of *London*: And whereas the said *Stanley Goddard* attended us at the *Guildhall* aforesaid, on this day, in pursuance of the said last mentioned adjournment, in order to finish his examination, and to make a full disclosure and discovery of his estate and effects, on being then and there duly sworn and required by us to make such disclosure and discovery, and we the said commissioners having, before we proceeded to act under and by virtue of the said commission, taken the oath appointed by an act of parliament passed in the fifth year of the reign of his late Majesty King George the Second, for commissioners of bankrupts to take before they act as commissioners in the execution of the powers or authorities given and granted by the said act, or any act or acts of parliament now in force, concerning bankrupts, did cause the following questions in writing

to be propounded to him the said *Stanley Goddard*,
and he the said *Stanley Goddard* to the said ques-
tions did upon oath give the answers thereto respec-
tively annexed, that is to say,—

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Question. As repeated adjournments of your last examination have taken place, in order that you might produce to the commissioners a full and true account of your estate and effects, where are your accounts and your balance sheet which you have made up to produce to the commissioners?

Answer. I have not been able to make them out yet, not being able to obtain the assistance of *Mrs. Goddard*; I cannot make out the accounts without her: which assistance she refuses till after the trial at law.

Q. Have you no accounts whatever to produce to the commissioners of the state of your affairs?

A. I have not made out any at present.

Q. Do you mean to swear, that you are incapable of making out any accounts, without the assistance of *Mrs. Goddard*?

A. I can make out some certainly, which are in the ledger.

Q. Why then, as you have been repeatedly told, that it was your duty to make out as good an account as you could to lay before the commissioners, have you not made out the best account you could, without the assistance of *Mrs. Goddard*, to lay before them?

A. Because I considered, that if I made out the account, and from that the assignees got possession of the monies, I might not, in the event of the commission being superseded, be enabled to recover the property of them afterwards.

Q. Have you no more satisfactory reasons to give

1819. to the commissioners for refusing or neglecting to produce any account to them of the state of your affairs, after so many adjournments of your last examination?

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A. Till last Wednesday evening, I did not know what account would be requisite: they might want the accounts for several years back; and from that time to this, it was impossible to make out any account.

Q. Have you any other reason to give for not producing any accounts at all?

A. No.

The bankrupt requests that the following letter may be put upon the proceedings; (which is granted accordingly); which letter he states he intended to refer to in his examination, in his last answer but one; and which letter is in the words and figures following,—that is to say:

Old Broad Street, November 9, 1819.

SIR,

“ In reply to your letter, we can only repeat, that you have frequently been told by ourselves and the commissioners and assignees, that you are required to render full and true accounts of all your property, debts, and effects, which you were possessed of, interested in, or entitled unto, at the time you became bankrupt; as well what belonged to you separately, as in your character of partner with Mr. *Lewis*, or otherwise. You will be particularly required, as you have before been informed, to account for the stock, debts, and effects of the partnership between yourself and Mr. *Lewis*, under the firm of *Steel, Goddard, and Co.*; and for the monies you have, from time to time, as well previous, as subsequent to the com-

mission, received on account of that firm, and of the firm of *Steel and Goddard*. You are also required to come prepared with a list of all the debts owing by you separately, and also as a partner with Mr. *Lewis*, or in any other character, and of the means or assets, by which such debts are to be satisfied, in part or in the whole; distinguishing the joint assets of the respective firms from the assets which belong to your separate estates."

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We are, &c.

PATERSON AND PEILE.

To Mr. *Stanley Goddard*.

Which answers of the said *Stanley Goddard*," &c.

The bankrupt having been brought up by *habeas corpus*, a motion was made for his discharge.

Mr. *Wilson* and Mr. *Rose*, for the bankrupt, contended, that the commissioners had not authority to commit upon the questions proposed.—The commitment, although, in form, a commitment for not giving satisfactory reasons to the commissioners, why certain accounts were not ready at a particular moment, is, in substance, for not producing the accounts. Both in form and substance, the commitment is bad on the words of the stat. 5 Geo. 2. c. 30. s. 16 (a). By the

(a) S. 16. "And be it further writing, all and every person enacted, that it shall and may and persons, against whom any be lawful for the said commis- commission of bankrupt is or sioners or the major part of them, shall be awarded, touching all to examine, as well by word of matters relating to the trade, mouth, as on interrogatories in dealings, estate and effects of

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former part of this statute (b), the bankrupt is directed to deliver to the commissioners all books of account in his possession at the time he became bankrupt: but there is no direction as to his making out any account (c). His duty is limited to the answering questions touching his trade, dealings, and effects: but these questions do not relate to any of those matters. It is true that the account required is an account of part of his dealings and effects; but the questions relate solely to the non-production of accounts. The commissioners say,—you have undertaken to produce an account on this day,—why have you not produced it? We are not satisfied with your reasons for the non-production: we, therefore, commit you. — In *ex parte Hiams* (d), the commissioners did not ground their commitment on the non-

all and every such bankrupt and bankrupts, and also to examine, in the manner aforesaid, all and every other person duly summoned before, or present at any meeting of the said commissioners, or the major part of them, touching all matters relating to the person, trade, dealings, estate, and effects of all and every such bankrupt or bankrupts, and any act or acts of bankruptcy committed by him, her, or them, and also to take down or reduce into writing the answers of verbal examinations of every such bankrupt or other person, had or taken before them as aforesaid; which examination, so taken

down or reduced into writing, the party examined shall and is hereby required to sign and subscribe: and in case any such bankrupt or bankrupts, or other person or persons, shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, or the major part of them, all lawful questions put to him, her, or them, by the said commissioners, or the major part of them, as well by word of mouth, as by interrogatories in writing," &c.

(b) S. 4.

(c) *Vide* s. 5 and 6, as to this.

(d) 18 *Ves.* 237.

delivery of accounts, for which they had not jurisdiction; but on the bankrupt's not satisfactorily answering questions as to the loss of certain accounts.—They then contended, that the bankrupt's answers were satisfactory.

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The LORD CHANCELLOR.

The letter set out in the warrant is dated as late as the 9th of November. It is stated upon the return, as if the first examination was on the 19th of June, and then there is an adjournment to the 24th of July, another to the 17th of August; a fourth adjournment to the 5th of October, and a fifth to the 2d of November. The first question states as facts, matters not contradicted by any answers: All matters embodied in questions, if not contradicted by the answers, the court considers as true; (a) and therefore, the court, must, upon this record, suppose, that these repeated adjournments since the 19th of June did take place, in order that he might produce the account to the

(a) *Crowley's case*, 1818. death, as *Perrott's case*, that the
2 *Swanston*, 78.—The LORD bankrupt must be taken to admit
CHANCELLOR, "I think it has that proposition." And again,
been settled that where a ques- *Ibid* p. 81, "The distinction esta-
tion is put to a bankrupt on his blished by all the cases is this,
examination, and in that question that if the commissioners say to
is embodied a proposition ex- the bankrupt,—On your former
pressing, as a fact, what he said examination you answered to
or did on a preceding day, if this effect, and he does not qua-
he gives such an answer as im- lify that statement, the court
plies, that he does not deny must take it to be true; because
that he said or did so, or does he must know whether he said
not qualify it, I think it has been so or no: a hard rule, but now
settled, even in cases of life and clearly settled."

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commissioners. The first meeting at which these questions were proposed was on the 19th of June, and that letter does not state any thing that occurred until the 9th of November:—what had the bankrupt been doing in the meantime?

Mr. *Wilson*.

He had been petitioning the court to supersede the commission; and an order was obtained to try an action for that purpose. — Mr. *Wilson* then made some allusion to the trial at law then pending; and to what had passed before the commissioners.

THE LORD CHANCELLOR.

I am satisfied by the answer that there was a trial at law depending, respecting the validity of this commission; but in cases of this nature, I am to look to the return, and to nothing but what appears upon the return (a).

Mr. *Heald* and Mr. *Montagu* for the assignees.

With respect to the jurisdiction of the commissioners to compel the production of a written account, there is no necessity in this case to agitate that question:—the written account was not required, except as the mode to which the bankrupt had referred for the explanation of his property. If, however, on any future occasion, the question does arise, there will, we conceive, be some difficulty in any bankrupt's being

(a) *Crowley's case*. 2 Swan- 270; *ex parte Oliver*, 2 Ves. & ston, 75; S. C. *Buck*, B. C. Bea. 249; S. C. 1 *Rose*, 413.

able to satisfy the court, that a commercial law was intended by the legislature to be inoperative, in exact proportion to the importance and magnitude of the concern.

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Case.

THE LORD CHANCELLOR.

Although one of the most painful duties I have to execute, is upon applications to discharge from warrants of commitment, it is some consolation to me to reflect, that, if I err in thinking that I cannot discharge the prisoner, he may have an opportunity of applying to-morrow to the Court of King's Bench or Common Pleas; and in vacation (*a*), to each of the judges individually. Formerly, if a bankrupt gave a direct answer, whether the commissioners did not believe him, or could not possibly believe him, still they had no power to commit him, because his answer was direct; and then the judge by *habeas corpus* had nothing to do, but to look at the questions and answers, and say whether the answers were direct: as, if they were, a judge, though he did not believe one syllable of what the bankrupt swore, was bound to discharge him (*b*); but this is not the present state of the law: the judge must now see, not only, whether the answers are or are not direct, but whether, (always taking the questions to be lawful questions), they are sufficient to satisfy the mind of a reasonable person. Such a rule must of necessity be the source of great pain in the

(*a*) *Vide* stat. 56 G. 3, c. 100. *parte Oliver*, 2 V. & B. 249;

(*b*) *Podley's case*, Leach, C. L. S. C. 1 *Rose*, 413; *Crowley's* 325. 4 Ed. over-ruled in *Ex case*, 2 *Swann*. 75; S. C. *Buck*, *parte Nowlan*, 6 T. R. 118; B. C. 270; *Cassidy's case*, 2 *Taylor's case*, 8 Ves. 328; *Ex Rose*, 220; S. C. 19 Ves. 320.

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mind of a judge : for, when he is about to determine that the answer is not satisfactory, and thus detain a man in prison, he cannot but reflect, that to another mind, fully as well able to judge as his own, the answer may appear satisfactory. I cannot illustrate this more strongly, than by the recollection, that, in one case, (a) the Judges of the Court of King's Bench thought the answer was insufficient, when no less a man than Chief Justice *De Grey*, and all the other judges of the Common Pleas, adjudged it to be quite sufficient. However, upon this return, I am clearly of opinion, that I cannot discharge the bankrupt:—I will not, however, decide finally to-day: but will take an opportunity of reconsidering the subject, and applying my mind, undisturbed by other matters, to a concern of such serious importance, as the liberty of the subject.

The question, in the present case, as far as it relates to the production of a written account, is, whether, in the course of examination with respect to the trade, dealings, and transactions of the bankrupt, the bankrupt has not himself made the production of his accounts, the only means of giving a satisfactory answer to questions proposed to him. Suppose for a moment, that, as is contended by Mr. *Wilson*, the commissioners could not say to the bankrupt — make out a balance sheet, and if you do not, we will commit you. — Is it not a possible case, — and is not this such case, that the bankrupt from time to time, five

(a) *Qu. Miller's Case*, 3 *Wilson*, 430. *Vide ex parte Nowlan*, 6 T.R. 20.

or six different times, by delaying his examination, and pledging himself to produce an account, as the only mode of explaining his trade and dealings, makes the production of such account part of his answer. The bankrupt is brought up on the 19th of June, and various adjourned examinations are had at his request till the 2d of November. The examination is again deferred, as he states himself, according to this return, "upon his assurance that he would make up his accounts, and be prepared to pass his last examination, upon being allowed a short time further." On the 13th of November the answers are as follow: and I cannot help here observing, that the law seems to impose upon the commissioners the duty of the severest caution as to the examinations, and that they are bound to state, not what they consider to be the result of the examination, but the questions and answers on which the commitment is founded (a): This examination commences with a question having reference to former proceedings. — "As repeated adjournments of your last examination have taken place, in order that you might produce to the commissioners a full and true account of your estate and effects, where are your accounts and your balance-sheet which you have made up to produce to the commissioners?" Now, as a lawyer, I am bound to state as admitted facts, because the bankrupt did not deny them, that there had been repeated adjournments, in order that he might produce to the commissioners a full and true account of his estate and effects; and likewise that he gave his assurance that he would do so. This is the law; and

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(a) See *Coombe's case*, 2 *Ross*, 398; *Brown's case*, *ibid*, 400; *Crowley's case*, 2 *Swans*. 80. 5 G. 2, c. 30, s. 17.

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so it was held in *ex parte Nowlan* (a), and in a stronger case, the *King* against *Perrott* (b). These admitted facts, (admitted as the bankrupt has not denied them), are very important in their bearing on the subsequent examination. The bankrupt says, "I have not been able to make out my accounts, not being able to obtain the assistance of Mrs. *Goddard*: I cannot make out the accounts without her assistance; which assistance she refuses till after the trial at law." *Question*. "Have you no accounts whatever to produce to the commissioners of the state of your affairs?" What is the answer to this? "I have not made out any at present." The question is—have you any? "Do you mean to swear that you are incapable of making out any accounts without the assistance of Mrs. *Goddard*?" *Answer*. "I can make out some certainly, which are in the ledger." The commissioners proceed: "Why then, as you have been repeatedly told that it was your duty to make out as good an account as you could to lay before the commissioners, have you not made out the best account you could, without the assistance of Mrs. *Goddard*, to lay before them?" He answers, "Because I considered that if I made out the account, and from that the assignees got possession of the monies, I might not, in the event of the commission being superseded, be enabled to recover the property of them afterwards." *Question*. "Have you no more satisfactory reason to give to the commissioners, for refusing or neglecting to produce any account to them of the state of your affairs, after so many adjourn-

(a) 6 T. R. 118.

(b) 2 Burr. 1122.

"ments of your last examination?" This question connects itself with the former questions, and the assurances he gave that he would make out the account. This is on the 13th of November, and he refers in his answer to an intimation which he had not received till the 9th of November, his surrender being on the 19th of June. And what is the answer he gives? "Till last Wednesday evening I did not know what accounts would be requisite, they might want the accounts for several years back; but from that time to this, it was impossible to make out any accounts." Can this be said to be a satisfactory answer to what he had been doing the whole time from the moment he surrendered on the 19th of June down to that 9th of November, which was the first time, after five adjournments, that any question was made by him as to the nature of the account he was to furnish; and before which time he had been informed of the sort of account which the assignees would expect? When he is finally asked, "If he has no other reason?" He says, "No; no other reason." This to my mind is not satisfactory. I think, therefore, the bankrupt must be remanded.

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The bankrupt was remanded (a)

(a) It seems that commissioners may, in their discretion, require a discovery, in writing, of the bankrupt's trade and dealings, estate and effects. *Vide Davie v. Mitford, 4 Barn. & Ald. 356.*

MIC. TERM.
Nov. 1820.

PRATT'S CASE (a).

A bankrupt is bound to disclose to the commissioners all circumstances relating to his property, notwithstanding that such disclosure may tend to establish an act of bankruptcy.

THE bankrupt, *Pratt*, was committed upon an examination, which, as far as it relates to the commitment, was as follows:—

Question. Were not the securities which you gave to *Cooper* partly bills of exchange, and partly securities of a different description?

Answer. The three first securities of £1000 each were bills of exchange; the other securities were given as collateral securities to the former: I mean that I never supposed he could avail himself of the whole.

Q. When was the first security given by you to *Cooper*?

A. On the 30th of March last. I don't allude to the first bond of £1000, because I nearly repaid that amount; and the bond was returned to me. The next security, after the 30th of March, was a warrant of attorney about the middle of April. I gave him, about the same time, a security upon a mortgage, which I held from *Henry Martin*, Sen. at Cowden in Kent; and likewise upon my interest in two warrants of attorney which I held against *William Robinson*, of Orsett in Essex: one for £500, the other for £450.

Q. What passed between you and Mr. *Cooper* before you were joined by Mr. *Bostock*?

A. Mr. *Cooper* expressed himself very angrily at

(a) *Ex relatione.*

my having given a security for my partner's capital. He said that I had suffered myself to be completely duped, and insisted upon my giving him a security of the same nature.

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Q. As you were induced to write to Mr. *Cooper*, in consequence of Mr. *Wrench* having obtained securities, do you mean to state, that you had no intention to secure Mr. *Cooper* who had befriended you, if he required security?

A. I mean to state, to the best of my recollection, that I had no intention, because I had no thought of it at that time. I went principally, if not entirely, with a view of consulting Mr. *White*, as to what measures I should pursue when I met *Wrench* again.

Q. You have stated, that you wrote to Mr. *Cooper* because you felt it your duty to inform him, but that you do not think you had any intention to give him security—do you mean that you thought it your duty to inform him, that he might protect you, or that he might take care of himself, or for what other reason?

A. My reason was that I might consult him and Mr. *White* upon a matter of such importance.

Q. Do you mean that it was a duty to yourself or to Mr. *Cooper*?

A. No; I mean, it was a duty to Mr. *Cooper* to inform him of so important a circumstance, and to hear his advice. I do not mean to state that I was disinclined to give him security; I only mean, that I believe I did not think about it at that time.

Q. Explain how you could think it a duty to Mr. *Cooper* to give him this information, unless it was that he might attend to his own interest.

A. As Mr. *Cooper* was my principal friend, I al-

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ways considered that he was entitled to know every circumstance of importance in my affairs.

Q. Do you mean for his sake or your own?

A. He was entitled for his own sake.

Q. Was it not that he might secure himself; and if not, in what other way was it for his sake?

A. My motive in writing to him was, not that he might secure himself, but that I might consult with him and Mr. *White*.

Q. I repeat the question which is again read to you.

A. I felt it my duty to inform him, that he might be in possession of the state of my affairs; and was willing that he might secure himself; but I do not believe that that was any part of my motive for writing.

Q. The question is again repeated and read to you.

A. I admit that it was, that he might be at liberty to act and advise as he thought best for me, his interest and mine being the same.

Q. The question is again repeated and read to the bankrupt.

A. I say that his interest and mine were the same; and, in securing me, he secured himself. So far it was for his sake.

Q. Do you mean to swear, that, when in your former answer to the question, "Do you mean for his sake or your own?" you answered, "He was entitled for his own sake," you meant that his interest and yours were the same, and for that reason only you had sent to him?

A. I meant that he was entitled for his own sake, that he might secure himself, or do whatever he thought proper; but not that I sent to him for that reason only.

On a subsequent day, a further examination of the bankrupt was had, when the following questions were proposed to him, and the following answers given:—

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PRATT'S
Case.

Q. How long were you in company with Mr. Cooper on the 30th of March?

A. But a few minutes. The examination alluded to relates to the securities given to Mr. Cooper, some of which were by deed. I therefore object and protest against the examinations which have already been taken; and also against any further examination for the purpose of extracting from me evidence that such securities were voluntarily given; inasmuch as such examination has a tendency to establish an act of bankruptcy. But I do not mean to admit that such securities were voluntary, or that any act of bankruptcy has been committed.

Q. How many minutes do you think you were with Mr. Cooper before Mr. Bostock entered?

A. I think about five minutes.

Q. Did you not, during that five minutes, and before Mr. Bostock arrived, agree to give three bills of exchange to Mr. Cooper?

A. I refuse to answer this question by the advice of my counsel, because the bills, to which this question relates, were part of the transaction connected with the deed which I afterwards executed, and to which the objection before stated refers.

In Michaelmas term, 1820, an application was made to the Court of King's Bench, by Mr. *Wilde*, on behalf of the bankrupt, for a writ of *habeas corpus*.

Mr. *Wilde* insisted, that the bankrupt, having dis-

1820.

**PRATT'S
Case.**

closed the property he had conveyed, and that the mode of conveyance was by deed, ought not to be examined as to circumstances tending to shew the deed was voluntarily given by him, inasmuch as, after the disclosure he had made of the property, and mode of conveyance, the necessary and only object and tendency of such further examination was to establish an act of bankruptcy. He admitted fully, that the bankrupt was bound to disclose the disposition of his property and the mode, although such circumstances might tend to prove an act of bankruptcy, and be what have been called links in the chain of evidence; but he contended, that he could not be examined directly as to whether the deed was voluntary.

The court refused to grant the writ, saying that the bankrupt was bound to disclose all circumstances respecting his property, be the consequences what they might (a).

(a) And see 1 *James* 1. c. 15. s. 7. which enacts that "it shall be lawful for the commissioners or the major part of them to examine the said offender or offenders, upon such interrogatories touching the lands, tenements, goods, chattels, debts,

bills, bonds, books of account, and such other things as may tend to disclose his, her, or their estate, or their secret grants, conveyances, and eloining of his, her, or their lands, tenements, goods, money, and debts, as they shall think proper."

Ex parte HOPLEY.—In the matter of
ILLINGWORTH (a).

LINC. INN,
Nov. 24,
1820.

A CREDITOR of the bankrupt for £10,500, having levied £2500 under an execution, claimed to prove the remaining £8000, under the commission. The commissioners refused to admit the proof unless he would give up his execution.

A creditor having, shortly before the commission, seized the effects of the bankrupt in execution, and having, after the commission, satisfied part of his debt by sale of the effects, admitted to prove the residue.

The Sheriff seized on the 3d of May, and on the 18th of the same month, the commission issued; in the July following, the goods were sold under the execution. The assignees had brought an action to recover the amount of the levy.

A petition to stay a certificate must be personally served two clear days before the petition day.

The LORD CHANCELLOR ruled that the petitioner had a right to prove the £8000 (b).

In this case the LORD CHANCELLOR decided, that the petition, which prayed that the certificate might be stayed, ought to have been personally served on the bankrupt two clear days before the petition-day (c).

(a) *Ex relations.*

Kendall, 1 *Ves. & Bea.* 543; nor by

(b) 1 *Jac. and Wal.* 423. The 14 section of the 49 G. 3, c. 121, was not considered to apply to this case. *Vide Linging v. Comyn*, 2 *Taunt.* 248; *ex parte Stanborough*, 5 *Mad.* 89.

his filing an affidavit in answer, *ex parte Harford*, *Buck*, 38; nor by his applying to advance the petition, or appearing upon it, *ex parte Grooms*, *Buck*, B. C. 39; where the bankrupt cannot be personally served, application must be made before the petition day, for an order that service at his place of residence should

(c) Personal service, *ex parte Harford*, *Buck*, B. C. 38; not waived by the bankrupt taking copies of the affidavit, *ex parte*

1820. Mr. Hart and Mr. Rose for the petition.

Ex parte
HOPLEY.
In the matter
of
ILLING-
WORTH.

Mr. Heald and Mr. Montagu against it.

LINC. INN, STEINMETZ v. HALTHIN and others.
Dec. 6.
1820.

The equity of **THIS** suit was instituted, in January, 1819, by the
the wife to a son and executor of *Mary Steinmetz*, against *James*
provision out of her property at- *Robert Oliver* and *Henrietta* his wife, and several
taches, for the benefit of her- other persons, to carry into execution the trusts of
self and her her will.
children, on the
filing of the bill
which gives the
court jurisdic-
tion as to that
property, whe-
ther the bill is
filed by the wife
or others; but
she may waive
it even after a
decree for a
settlement,
before its exe-
cution. The
children held to
be entitled to
the benefit of
that equity at-
taching upon
bill filed by an
executor, though
the wife died
before answer.

Mary Steinmetz, by her will, gave the residue of
her estate and effects to the plaintiff and another ex-
ecutor, since deceased, in trust, to invest the same in
the purchase of stock, and pay the interest to her
daughter, *Philippa Kent*, for her life, and after her
death, in trust, to divide the same equally amongst
her own and her daughter's children then living: the
share of such of the said daughter's children as should
have attained twenty-one to be paid on the death of
her said daughter, and the share of such of them as
should be under that age, to be paid on their attaining
that age, and the interest in the meantime applied for

be good service, *ex parte* construed strictly in favor of the
Harrison, *infra*; petitioner not certificate, see cases cited, 2
permitted to supply defect of his *Mont. B. L.* 154; *ex parte* *Hirst*,
original case by subsequent af- *infra*; *ex parte* *Curtis*, 1 *Rose*,
fidavits, though in reply, *ex* 274; *ex parte* *Emmett*, 1 *Mad.*
parte *Cudall*, *supra*; practice 14.

their maintenance, and the share of any dying before that age to go to the survivors.

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STEINMETZ

v.

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and others.

The testatrix died in 1808, and the residue was invested by the plaintiff in the purchase of £1,300, bank five per cent. annuities.

Philippa Kent died in 1816, and left three children; who, together with the plaintiff, became thereupon entitled, under the will, each to one-fourth part of the £1,300, bank five per cent. annuities. *Henrietta Kent*, one of the said three children of *Philippa Kent*, in August, 1808, intermarried with the defendant *Oliver*. In December, 1811, a commission of bankrupt issued against *Oliver*, and in May, 1812, he obtained his certificate under that commission:—In July, 1818, a second commission issued against *Oliver*.

The defendants *Oliver* and *Henrietta* his wife, appeared to the bill; but before they had put in their answer, or any further proceedings were had in the suit, and in March, 1819, *Henrietta Oliver*, (having previously attained twenty-one), died, leaving infant children; whereupon a bill of revivor was filed, to which the infant children, and the administrator of *Henrietta Oliver*, were made parties. *Henrietta Oliver* had no settlement on her marriage. The assignees under the first and under the second commission were parties to the suit, and, severally, claimed the share of *Henrietta Oliver* in the £1,300, bank annuities.

The only material question in the cause was, whether—

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1820, **STEINMETZ**
v.
HALTHIN
and others, ther the children of *Henrietta Oliver* were entitled to a provision out of their mother's one-fourth part of the £1,900, bank five per cent. annuities, or whether the whole was to be paid to the assignees under the first commission,

Mr. *Heald* and Mr. *Bligh* for the plaintiff: Mr. *Cooper* and Mr. *Barber* for several defendants. *Grosvenor v. Lune*, 2 *Atk.* 180; *Scriven v. Tapley*, *Amb.* 509, 2 *Eden* 337; *Rowe v. Jackson*, 2 *Dick.* 604; *Murray v. Lord Elibank*, 10 *Ves.* 90; *Herle v. Greenbank*, 3 *Atk.* 695; *Macaulay v. Phillips*, 4 *Ves.* 15; *Lloyd v. Williams*, 1 *Mad.* 450, were cited.

THE VICE CHANCELLOR,

At law the husband is absolutely entitled to personal property given to the wife, and the executor or trustee is well acquitted by payment to the husband. If, however, the property comes to be administered by a court of equity, neither the husband, nor those who claim under him, are permitted to possess any part of it, without first making a provision out of it for the wife, unless the wife consents, in court, to wave that equity. If the provision be made for the wife, it enures for the benefit of her children, and will pass to them after her death; but the equity is personal to the wife, and the court acknowledges no original title in the children (a), who can claim only that provision, which the wife thinks fit to secure for herself, and who are deprived of all provision, if the wife consents, that the husband, or those who claim under him, shall

(a) *Scriven v. Tapley*, *Amb.* 509, 2 *Eden.* 337; *Lloyd v. Williams*, 1 *Mad.* 453.

possess the whole property. It has been already decided, that an actual settlement is not necessary to give title to the children, and that, if there be a decree in a cause, referring it to the master to approve of a proper settlement for the wife and children out of personal estate given to her, and the wife die before any proceeding under the decree, the settlement must still be made for the children (a): it being considered, that, under such circumstances, the equity of the wife, for the benefit of herself and her children, had attached upon the property, and was not defeated by her death, as far as regarded the children. Yet, after such a decree, and even after the master had actually approved of a settlement under it, and before its execution, the wife, if living, might have appeared in court, and waved the settlement, and altogether defeated her children (b).

1628.

STEINMETZ
v.
HALTHIN
and others.

The principle, therefore, seems to be, that, when once the equity of the wife has attached upon the property, it continues for the benefit of the children, notwithstanding the death before a settlement executed, unless she has subsequently thought fit to wave it.

The question then is, what proceeding is necessary to attach this equity of the wife upon the property, and whether, for that purpose, there must be a decree, or order of reference to the master to approve of a settlement. The form of such a decree or order does not

(a) *Rowe v. Jackson*, 2 Dick. cited, 10 Ves. 89.
604; *Murray v. Lord Elibank*,
10 Ves. 84; *Martin v. Mitchell*, 10 Ves. 88 & 91.

1820.
STEINMETZ
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and others.

declare the equity of the wife, it merely proceeds to take measures for giving effect to the wife's acknowledged equity. The right of the wife, therefore, does not depend upon the decree or order (a). Suppose a wife files a bill against the executors or trustees, for the purpose of giving effect to this equity, it can hardly be questioned, that an executor or trustee could not afterwards safely pay the property to the husband, and the only reason to be assigned for that consequence is, that the filing of the bill gives the court jurisdiction as to the property, and that the equity of the wife attaches with the jurisdiction. The present bill is not filed by the wife, but by the trustees, for the purpose of acting under the direction of the court in the administration of their trust. It must be admitted, that the trustees could not, pending this suit, have parted with the property to the husband, and surely the institution of such a suit, for such a purpose, gives to the court the same jurisdiction with respect to the property, as if the bill had been filed by the wife. I am, therefore, of opinion, that, upon this bill being filed, the equity of the wife attached upon the property, and that the subsequent death of the wife pending the suit, without waving her equity, though before answer, gave to the children an immediate title to the provision that the wife could have acquired, if living.

Declare the right of the children accordingly.

The bill was dismissed as against the assignees

(a) *Vide Murray v. Lord Elibank*, 10 Ves. 90.

under the second commission, with costs to be paid by them. The assignees under the first commission to have their costs out of the fund; and, by consent, a moiety of the interest and of the principal of *Henrietta Oliver's* share was ordered to be paid to the assignees under the first commission; and the other moiety of the said interest and principal to be paid into the bank, with liberty for the children to apply.

1829.

STEINMETZ
v.
HALTHIN
and others.

Ex parte LEWIS.—In the matter of LEONARD. Feb. 13, 1819.

REAL property of the bankrupt was offered to sale by auction in two lots, on different days, and both lots were bought in by the assignee, without the authority of the creditors. Upon a re-sale, there was a loss upon one lot, and gain upon the other. The balance was in favor of the estate.

Real property of the bankrupt put up to sale by auction in two lots, and bought in by the assignee, without the authority of the creditors. Upon a re-sale, there is loss on one lot and gain on the other. Though the balance is in favor of the bankrupt's estate, assignee charged with the loss on the lot under-sold.

This was a petition, that the assignee might be personally responsible for the loss upon the lot which had been under-sold.

Mr. Hart and *Mr. Montagu*, against the petition, contended, that as, upon the whole, the estate had been benefited, and as the assignee had acted *bond fide*, the court would not make him responsible for the loss which had happened by his interference, without at least giving him the benefit of the profit gained to the es-

1819. tate by a similar exercise of his discretion in buying in the other lot.

Ex parte
LEWIS.

In the matter
of

LEONARD.

The LORD CHANCELLOR said, that an assignee who bought in the bankrupt's property, without the consent of the creditors, did it at his peril:—that he would hold him strictly to his bargain, where it appeared beneficial to the estate, and responsible for any loss which his interference at the sale might occasion, without permitting him to set off the profit in one purchase against the loss in another;—and ordered, that the assignee should be charged with all sums at which it should appear, that he, or any person by his order, or for his use, had bought in any of the bankrupt's estate, not having the consent of the creditors of the bankrupt, in due manner obtained, for buying the same.

LINC. INN,
Feb. 21,
1821.

Ex parte MARKS,—In the matter of MARKS.

Bankrupt not allowed the costs of his petition to supersede the commission, where he was in a situation to try its validity at law in the first instance.

UPON the petition of the bankrupt to supersede his commission, there being contradictory affidavits, an issue was directed. The verdict was in favor of the bankrupt, and an order of *supersedeas* was made. This was an application by the bankrupt for the costs of the former petition.

The VICE CHANCELLOR.

This petitioner ought to have proceeded, in the first instance, at law, in the place of presenting his petition to this court; and, for that reason, he is not

entitled to the costs of the first petition, which were unnecessarily incurred (a).

1821.

Ex parte
MARKS.
In the matter
of
MARKS.

Ex parte HARRISON.—In the matter of GREY. LINC. INN,
February,
1821.

IN this case, the petition to stay the certificate was not served before the following petition day, but an application was made on that petition day, that future service at the last residence of the bankrupt might be good service of the petition.

The court will not order, that service of a petition to stay a certificate at the bankrupt's residence should be good service, unless the application be made before the petition day: except in cases, where an earlier application is prevented by the conduct of the bankrupt.

The VICE CHANCELLOR said, that he could only make such an order in cases in which it was established, that the petitioner, having used reasonable diligence, was prevented, by the conduct of the bankrupt, from making an earlier application for the special service; that, in ordinary cases, the special service, as well as the common service, must be before the petition day.

Ex parte WHITCHURCH. — In the matter of
ROOD.

LINC. INN,
Feb. 24,
1821.

PETITION by a mortgagee to stay the bankrupt's certificate, until after sale of the mortgaged premises and proof for the deficiency.

A mortgagee may petition to stay a certificate.

(a) *Ex parte* Billiard, *Buck. B. C.* 220; *ex parte* Edwards, *Ibid*, 232; *ex parte* Ranken, 3 *Mad.* 371.

1821.

Ex parte
WHIT-
CHURCH.
 In the matter
 of
 Rood.

The petitioner applied at the third public meeting, under the general order, to have the mortgage accounts taken. The commissioners were proceeding to take the accounts, and had appointed a day for the sale; but, in the meantime, the certificate was signed by the commissioners.

Mr. *Montagu* for the petition.

Mr. *Rose, contra*, contended, that there was no precedent of a mortgagee, who had an available security for his debt, being permitted to stay the bankrupt's certificate:—and that, even supposing he had, abstractedly, such right, the petitioner, in the present case, had estopped himself by his own laches in not applying to prove before the third public meeting.

The VICE CHANCELLOR.

I am not aware of any case in which the court has so stayed the certificate upon the application of a mortgagee. But if the court would so interfere on the part of a mortgagee, he must at least make out, that he has used all diligence to establish the amount of his proveable debt. In this case, the mortgagee made no application to the commissioners until the third meeting.

Petition dismissed.

The petitioner appealed.

March,
 1821.

Mr. *Cullen* and Mr. *Montagu*, for the petition, contended, that there had been no laches on the part of the mortgagee. The common practice, both in cases of mortgagees, and of joint creditors seeking to prove

under a separate commission, was to receive such applications at the third public meeting, and that many precedents might be found of certificates being stayed on the application of mortgagees, whose debt had not been ascertained.

1821.

—
Ex parte
WHEAT-
CHURCH.
In the matter
of
ROOD.

The LORD CHANCELLOR directed, that search should be made at the bankrupt office for precedents. Precedents were produced: *ex parte Rigg*, in the matter of *Perry*, 20 March, 1780; *ex parte Horne*, in the matter of *Sidebottom*, 20 July, 1782; *ex parte Hurford*, in the matter of *Kekwick*, 10 April, 1784. But, as the probable amount of the balance was disputed, the Lord Chancellor did not make the order for staying the certificate, but directed it to be deposited in the bankrupt office, subject to his order, and without prejudice, and all proceedings under the order of the Vice Chancellor to be stayed: the mortgage account to be taken, with liberty for either of the parties to apply (a).

(a) *Ex parte Ramsbottom*, 1812, 2 Chris. B. L. 709.

LINO. INN, *Ex parte* SMITH.—In the matter of HARDING
Jan. 16, and others.
1821.

Joint creditors may petition to prove against the separate estate on account of a fraudulent abstraction of joint funds, without a previous application to the commissioners. Where one partner is entrusted with the entire management of the partnership business, and openly, without disguise or concealment, enters in the partnership books the monies withdrawn by him from the joint stock for his separate use, it is not a fraud, which will entitle the joint creditors to prove against the separate estate of that partner.

PETITION by joint creditors to prove against the separate estate of *Harding*, on the ground of a fraudulent abstraction of partnership funds.

Mr. *Montagu* objected, that the petitioners ought first to have tendered the proof to the commissioners.

The VICE CHANCELLOR overruled the objection (a); and, as to the merits of the petition, stated, that if one partner be entrusted with the entire management of the partnership concern, and he withdraw monies for his separate use, which he duly and openly enters in the partnership books, this is not a fraud, which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction, or wholly omits and conceals it (b).

Inquiries directed before the master with reference to this principle.

Mr. *Rose* for the petition.

Mr. *Horne* and Mr. *Montagu* for the separate creditors.

(a) *Ex parte* Moody, 2 Rose, 414.

(b) *Ex parte* Harris, 1 Rose, 130 & 437.

Ex parte WOODS.—In the matter of WOODS.

LINC. INN,
April 16,
1821.

PETITION by the bankrupt to be discharged out of custody. The last examination of the bankrupt had been adjourned, *sine die*, and during that adjournment, and before any further meeting was had, the bankrupt was arrested.

Where the last examination is adjourned, *sine die*, the bankrupt is not protected from arrest.

Mr. Teed for the petitioner. No express power is given to the commissioners, by 5 Geo. 2, to enlarge the time for the bankrupt's examination: but after the numerous decisions in which that power has been recognised, it cannot be doubted that they have authority to adjourn to a particular day; but whether this power extends to an adjournment, *sine die*, has never been decided. The intention of the act, in protecting the bankrupt during an adjournment, is, that he may have every facility of access to his books and accounts, to enable him to prepare such a statement of his affairs, as may induce the commissioners to pass his last examination, and procure him his certificate. If this arrest should be pronounced to be legal, these objects will be defeated.

Mr. Pemberton, *contra*, contended, that it could never be the intention of the legislature to extend the privilege of freedom from arrest to a *sine die* adjournment by the commissioners, which, on this construction, would protect a bankrupt for his life; and the commissioners would have a more extensive power than the Lord Chancellor.

Mr. Montagu, *amicus curiæ*, said, that, in general, the

1821.

Ex parte
WOODS.
 In the matter
 of
WOODS.

reason of the commissioners adjourning a bankrupt's examination, *sine die*, was, that they despaired of obtaining any further satisfactory information, and wished to avoid burthening the estate with unnecessary meetings: at the same time avowing their readiness to receive the bankrupt's accounts, whenever he was prepared to pass them; that commissioners frequently adjourned a bankrupt's examination, *sine die*, when, acting strictly, they would have committed him; and that they had no power to summon a bankrupt to pass his accounts; which alone was a sufficient objection to a privilege so enormous as the one now claimed.

THE VICE CHANCELLOR.

I am of opinion that this bankrupt is not entitled to protection. Protection is given to a bankrupt, in order that he may prepare himself for his examination by the commissioners, and may be able to attend them; and this principle can have no application to an adjournment, *sine die*, which appears to be only adopted, where the commissioners consider all further examination useless.

Petition dismissed.

LINC. INN, *Ex parte* **HIRST.** — In the matter of **HOUSEMAN.**
April 19,
1821.

Petition to stay
 the bankrupt's
 certificate, at-
 tested by the
 solicitor's
 agent, which is

PETITION to stay the bankrupt's certificate.

An objection was made, that the signature of the petitioner was not attested, in conformity to the general order, dismissed, with costs.

ral order of the 12th of August, 1809. The attestation was by a person describing himself as agent to the petitioner's solicitor.

1821.

Ex parte
HIRST.
In the matter
of
HOUSEMAN.

The VICE CHANCELLOR.

The petition ought to have been attested by the petitioner's solicitor or agent. The attestation by the agent of the solicitor is not within the order (a).

Mr. *Horne* for the petition.

Mr. *Heald contra*.

Petition dismissed, with costs (b).

Ex parte READ.—In the matter of SOWERBY.

LINC. INN,
April 27,
1821.

THE LORD CHANCELLOR.

There is a circumstance mentioned in this petition, which, though not adverted to in the prayer, is material. *Reddish*, one of the assignees, is an accountant; that is, he is a partner in a firm of persons, who are accountants. I understand, that it is by no means an uncommon thing for accountants to procure themselves to be chosen assignees: the consequence of which is, that, instead of filling that office without reward, they receive considerable sums out of the estates, in their capacity of accountants. I certainly was not aware, till now, that such a practice existed:

Assignees,
being account-
ants, not per-
mitted to
charge the es-
tate for busi-
ness done as
accountants.

(a) *Ex parte* Weston, 1 *Mad.* 75. (b) 2 *Mont.* B. L. 154.

1821. but my present opinion is, that if an assignee be an accountant, and do not think proper with his co-assignee to appoint an accountant, over whose conduct they are both to keep a strict watch, but choose to act as accountant himself, being also invested with the authority of assignee, I will not permit him to charge for his labor. It is a question of general importance; and I will not decide it without consulting the Vice Chancellor, who administers so much of the law in bankruptcy.

—
Ex parte
 READ.
 In the matter
 of
 SOWERS:

May 5. The LORD CHANCELLOR.

I have conferred with the Vice Chancellor upon the subject of allowing assignees, who are accountants, and act as such, to charge the estate for business done as accountants; and it is our opinion, that no such charges can be allowed; and that it makes no difference upon general principles, whether the accountant assignee be a partner in a house of accountants, by whom such charges are made, or whether he act as such upon his own separate account.

LINC. INN, *Ex parte* LOWE.—In the matter of AMYES.
 April 27,
 1821.

Where a commission is taken out in violation of good faith &c., **THIS** petition prayed, that the commission, which had not been opened, might be superseded; and that the solicitor, who sued out the commission, might be application may be made to the court to supersede it, notwithstanding that it is supersedeable at the bankrupt office for want of prosecution.

Application to remove a solicitor from being or acting as a Master Extraordinary of the court of chancery, and to strike him off the roll of such court, though it may be properly made, by reason of his conduct in matter of bankruptcy, should not be made in the bankruptcy, but should be addressed to the general jurisdiction of the court.

removed from being, or acting any longer as a Master Extraordinary in the Court of Chancery, and might be struck off the roll as solicitor of such court; and that *James Roberts* the younger, the petitioning creditor, and the said solicitor, might pay the costs of superseding the commission and that application.

1881.

Ex parte
Low.
In the matter
of
Ames.

It was stated, by the petition, and the affidavits of *Low* and *James Roberts* the younger in support of it, that *Ames*, previously to the month of July, 1814, carried on the trade of a miller, and having become insolvent, a commission of bankrupt issued against him, some time in the month of August then following; that, after the issuing of the said commission, a meeting of his creditors was convened, and, his affairs being inspected, it was the unanimous opinion of the creditors attending the meeting, that it would be inexpedient to resort to a commission, but that *Ames* should assign his property to trustees, for the equal benefit of his creditors. That, accordingly, the petitioner, and *Joseph Beddard* lately deceased, who were two of the principal creditors of *Ames*, were chosen trustees for the purpose aforesaid, and, by indentures of lease and re-lease, bearing date the 9th and 10th days of September, 1814, *Ames* conveyed all his real and personal estate unto the petitioner and *Joseph Beddard*, their heirs, &c. in trust to dispose thereof, and apply the proceeds for the equal benefit of his creditors, who should execute the said deed. That, in consequence of the said resolution of creditors, that commission was abandoned. That amongst the creditors of *Ames* was *James Roberts* the elder, the petitioning creditor's father, who was upwards of 70 years of age, and, for some time previous, had been very infirm, both in body and mind, and unable to speak so

1821.
 —
Ex parte
 LOWE.
 In the matter
 of
 AMYES.

as to be understood, and totally inadequate to transact any business. That the debt of *James Roberts* the elder was secured by two promissory notes, given by *Amyes*, for sums of money amounting together to about £100., and on which there was some arrear of interest; and, soon after the said conveyance was executed, the petitioner went to *James Roberts* the elder to explain the nature of the said trust deed, but that, *James Roberts* the elder appearing totally incapable of understanding the nature of the transaction, the petitioner addressed the said *James Roberts* the younger, who was then present, and informed him of the particulars of the said deed; whereupon *James Roberts* the younger, on behalf of his father, said, that his father should not execute the trust deed, but that he should wait the event of *Amyes* being thereafter enabled to pay the said debt in full; and *James Roberts* the younger, at the same time, agreed, and openly signified his determination, not to sue out a commission of bankrupt against *Amyes*, or in any manner to defeat the object of the trust deed, and expressed his willingness, on the part of his father, to sign any undertaking to that effect. That *John Jones*, who did not attend the meeting of creditors, afterwards stated himself to be a creditor of *Amyes* for the sum of £60., but declined to sign the deed, and that the solicitor, who sued out this commission, signed the same as a creditor of *Amyes*. That in the beginning of May, 1817, *James Roberts* the younger was prevailed upon by the said *John Jones* and the said solicitor, who suggested to him, that there was great mismanagement under the trust deed, to consent to strike a docket against *Amyes*, and that, for the purpose of making the said *James Roberts* the younger a creditor of *Amyes*, *John Jones* procured *James Roberts* the

elder to mark each of the said promissory notes with a cross, by way of endorsing the same to *James Roberts* the younger, and that the said solicitor then prepared an affidavit to be made by *James Roberts* the younger, that the amount of the notes and interest was due to him as endorsee thereof, although *James Roberts* the younger never gave any consideration for the same; and which affidavit *James Roberts* the younger signed, by the direction of the said solicitor, who administered to him the oath, as to the truth thereof: That the said solicitor then drew or filled up a bond to the Lord Chancellor, in the usual form, which was executed by *James Roberts* the younger, and attested by the said solicitor and *John Jones*: That the said solicitor, on the 31st day of May, 1817, being a few days after he had obtained such affidavit and bond, struck a docket against *Amyes*, upon the petition of *James Roberts* the younger, on an act of bankruptcy alleged to have been committed in or about the month of July, 1814, and, on the 3d of June, 1817, sued out a commission thereon: That the said commission was not attempted to be acted upon till the 1st of July, 1817, and that *James Roberts* the younger, afterwards, declined to attend the meeting for opening the commission, or to proceed therein.

James Roberts the younger, in a subsequent affidavit, stated, that he did agree not to disturb the trust deed, and that his father was not indebted to him at the time of the promissory notes being endorsed to him: and it appeared, that in March, 1816, a dividend was paid under the trust deed.

By the affidavits in answer to the petition, it was stated, that *Roberts* the younger had not been pre-

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Ex parte
Lowe.
In the matter
of
Amyes.

1821. vailed upon, or persuaded by *John Jones* and the solicitor to issue the commission, by any suggestion of mismanagement in the trust deed or otherwise: that *James Roberts* the elder, though incapable of articulation, possessed his understanding; and that the said solicitor inquired of him, if he had received valuable consideration from his son for the two promissory notes, and that *James Roberts* the elder signified, he had received valuable consideration for them; and that *James Roberts* the younger informed the said solicitor, that his father was indebted to him to the amount of £160.

Ex parte
Lowz.
In the matter
of
AMYES.

This petition was heard before His Honor the Vice Chancellor, who dismissed it with costs, and the petitioner appealed.

The *Attorney General*, Mr. Cullen, Mr. Horne, and Mr. Rose, for the appellant.

Mr. Wetherell and Mr. Montagu, *contra* (a).

THE LORD CHANCELLOR.

During the argument of this case, I expressed a wish to be informed of the grounds upon which this petition had been dismissed with costs; and it has been stated to me, that the judgment of the Vice Chancellor proceeded, not upon the particular circumstances of the case, but upon this, that, the commission not having been prosecuted within the limited time, the

(a) In consequence of the death of the petitioner, after the argument on the petition of appeal, and before the judgment, a petition, in the nature of a petition of revivor, was presented by his executors.

order for a supersedeas might have been obtained, as of course, and the application therefore was unnecessary.—The first question then is, whether a petition of this nature is improperly addressed to the Great Seal, by reason that, the commission not having been prosecuted, the application might have been made to the office, as matter of course. The true question is whether, if a commission has been taken out, (and I protect myself now, and the parties before me, from any misapprehension), in furtherance of a conspiracy to harass an individual, or contrary to that good faith, which ought to obtain between debtor and creditor: in other words, if a commission has been taken out, where the party has no right to support it, and where it can be truly represented as matter of oppression, the only remedy is to apply to the bankrupt office to supersede, or whether the party has not a right to come here to complain of such a proceeding, and to be indemnified in the nature of excessive costs, which he may have incurred by the commission being taken out and not proceeded in. I have certainly come to an opinion, that, in this sort of case, the subject is entitled to come to the court to have the commission superseded by a formal order, notwithstanding that he might have contented himself with doing it in the ordinary way.

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Low.
In the matter
of
ANYA.

With respect to some parts of the prayer of this petition, I entertain very serious doubts. The application, that a solicitor may be removed from being or acting as a master extraordinary of the court, and may be struck off the rolls, may very properly be made, by reason of his conduct in a matter of bankruptcy, but I doubt very much, whether it should be made in the bankruptcy; it should rather be addressed

1821. to the court in its general jurisdiction over its officers.

Ex parte
Lowz.

In the matter
of
Amyra.

I think it is absolutely impossible to doubt, that this commission ought to be superseded. The bankrupt had a commission taken out against him: It afterwards occurred to the great body of the creditors to think, it would be more beneficial, if a trust deed were executed: Accordingly, the property is assigned to the petitioner and another person for distribution amongst the creditors. Nothing is more clear than this, that, where persons think fit to accede to such a trust deed, they cannot afterwards complain of what is done under it, for this reason amongst others, that they have authorised the division of the property under the deed, and if they afterwards take out a commission, they put themselves in the situation of recalling their confidence from those in whom they expressed that they placed confidence, and of reclaiming what has been paid by the trustees under the circumstances of that confidence. Two promissory notes are given by the bankrupt to the father of the petitioning creditor. It is sworn, and not denied, that *Roberts* the younger treated his father as incapable of acting for himself, and it is admitted on all hands, if he could act for himself, he could not speak, he had lost his articulation; and if he could assent, he could only do it, to use the language of some of the affidavits, by signifying his assent. It is impossible to deny, that *Roberts* the younger had bound himself not to disturb the arrangement under the trust deed; however, he is prevailed upon to take out a commission, and what is material, the first commission is not superseded. It became necessary that he should vest in himself some debt: The father endorses the

notes to his son: it is an admitted fact, he could not state what he was doing, and that he could not write; but *Jones*, being also a creditor, signs the notes, after *Roberts* has made his mark, and this long after the act of bankruptcy, after the trust deed, and after the first commission. It is said, that the father being asked, whether there was a valuable consideration for the transfer, signified his assent: It is clear he could not state his assent; how he signified his assent, except by the conjecture of others, it is difficult to understand. The petitioning creditor swears positively, that he was no creditor of his father, when the notes were endorsed: that he was no creditor of the bankrupt. To be sure, he is contradicted essentially in this; contradicted, however, only in what he said. But am I to support such a commission? I am of opinion, most clearly, that I am not; and, though there is a good deal of contradiction in the affidavits, yet, to the extent of superseding the commission, I can have no difficulty, in a case where the petitioning creditor swears he has no debt, and gave his solemn assurance he would not disturb the trust deed, and the solicitor, who took out the commission, was a party to the trust deed. It is impossible to permit this commission to be superseded without these observations, which could not have been made, if it had been superseded under the ordinary application at the bankrupt office.

1821.

Ex parte
Low.
In the matter
of
AMES.

The question of costs was reserved.

On this day, the Lord Chancellor said, he could not supersede the commission at the costs of the petitioning creditor, of whose evidence *Lowe* had availed himself in support of his petition; and as to the rest of

Aug. 30.

1821. the prayer, without entering into the grounds of it,
 ——— that the petitioner was not entitled, upon such an ap-
Ex parte plication, to that species of relief.
Lowr.
 In the matter of
 of
ANYER. Commission superseded, without costs.

LINC. INN, *Ex parte* GRAVES.—In the matter of WESTRON.
 June, 1821.

Assignees may apply to supersede, even for defects appearing on the proceedings: but each application will be watched with great jealousy: and it is their duty to do all in their power to clear away doubts as to the validity of the commission, before they apply.

PETITION by the assignees to supersede, for want of a petitioning creditor's debt, and act of bankruptcy.

Westron proposed a composition with his creditors of 12s. in the pound; but before the proposal could be carried into execution, a commission of bankrupt issued against him. After the commission issued, and before the assignees were chosen, the bankrupt represented to the petitioners, that he had not committed any act of bankruptcy. The petitioners, after they were chosen assignees, wrote to the petitioning creditor as follows:—

The petitioning creditor is bound to give every information in his power upon every subject which comes within his knowledge as petitioning creditor.

It is the first duty of assignees, to satisfy themselves, that the commission is well-founded.

“ We are very much afraid, indeed we feel convinced, the evidence on the proceedings relative to
 “ *Mr. Westron's* leaving his house, does not amount
 “ to an act of bankruptcy; especially when explained, as we know it can be, and as *Mr. Tilleard* acquainted you at Taunton: you may, however, as
 “ you then intimated, be able to prove some other
 “ act: and in that case, if you will have the goodness to advise us, we will immediately request a
 “ meeting of the commissioners, for the purpose of
 “ examining any witnesses you think proper on the

“ subject: but we cannot rely upon what appears upon the proceedings, and we shall be under the immediate necessity of making an application to the Lord Chancellor to supersede the commission at your costs, unless we can procure more satisfactory evidence of an act to support it. There is also something not quite clear to us respecting your debt as petitioning creditor. Mr. *Westron* informs us, that the bond referred to in your deposition, was entered into by you, before he was a bankrupt, some years ago; and that, even if you had a debt, *Westron* says he has since sold you goods, by which it is reduced much below £100., and that you had never applied for payment: and we felt some surprise at your not offering to prove any debt. We only want to be satisfied of the requisites to support the commission, in order that we may not get into any difficulty. We have therefore candidly stated to you, all that has come to our knowledge likely to affect the commission; and we hope for as satisfactory an explanation as you can furnish us with; and that, with as little delay as possible: for we feel at present in a very awkward situation, and no time must be lost in applying to the Lord Chancellor for relief.” No information being furnished by the petitioning creditor, as to his debt and the act of bankruptcy, a second application was made to him by the petitioners, stating—
 “ You make no answer to our observations respecting the insufficiency of the act of bankruptcy, and your debt;” and adding—“Should the commission be ultimately superseded, you will be liable to all the costs incurred. We hope, therefore, you will not delay giving us the necessary explanations respecting your debt, and adducing any further proof

1821.

Ex parte
 GRAVES.
 In the matter
 of
 WESTRON.

1821. " of the act of bankruptcy you may think it advise-
 " able."

Ex parte
 GRAVER.
 In the matter
 of
 WESTON.

To this application the petitioning creditor returned no answer; nor could the assignees procure any further information. The petition prayed, that the commission might be superseded, at the costs of the petitioning creditor.

April. The petition was heard before his honor the Vice Chancellor, who expressed an opinion, that assignees could not apply to supersede, upon grounds appearing upon the proceedings; but declined giving judgment, until he should have conferred with the Lord Chancellor upon the subject.

May 2. The VICE CHANCELLOR stated, that he had conferred with the Lord Chancellor; and that the result of such conference was, that he was confirmed in the opinion he had expressed.

Petition dismissed.

From this decision the assignees appealed.

June 30. Mr. *Horne* and Mr. *Montagu* for the petition.

The petitioning creditor is pledged to communicate every circumstance within his knowledge, respecting the validity of the commission. The act of bankruptcy upon these proceedings is, at present, invalid, although capable of explanation; and the debt may be good, although the petitioning creditor never attempted to prove it at a public meeting. In *ex parte*

Jackson (a), the Chancellor expressly declares, that
 "A petitioning creditor is pledged to the validity of
 the commission, and to every act that is necessary for
 its preservation;" so also in *ex parte Glossop (b)*.
 The assignees are not, indeed, to hunt for objections,
 but are they to proceed, if there does not exist one of
 the requisites to support the commission? If the as-
 signees discover that the commission is invalid, are
 they to disclose the invalidity to purchasers, and re-
 duce or destroy the estate, or conceal it to the injury
 of the purchasers, or themselves? Are they to pro-
 ceed, at a great expense, for a long period of time,
 ultimately to sustain irreparable loss, or at once to
 put an end to what ought never to have been issued?
 It is said, that the assignees ought, before they ac-
 cepted the trust, to have been well assured of the va-
 lidity of the commission; but, before their election,
 they have no means of judging upon these facts. If,
 upon their election, objections are found, it is then,
 and not till then, their duty to have all doubt remov-
 ed. If this commission is bad, it is better, that it
 should at once be superseded; if good, no possible
 evil can result from this application.

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Ex parte
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Mr. Wetherell and Mr. Rose, contra.

No precedent of assignees trying the validity of a
 commission, which no one contests: the commission-
 ers were satisfied, and found the bankruptcy: the
 petitioners accepted the trust, and, by so doing, pub-
 licly acknowledged the commission, which they are
 thenceforward bound to support. Having executed

(a) 2 *Rose*, 189.

(b) 2 *Rose*, 388.

1891. the deed, they are estopped, though they might come here upon fraud or collusion. If the creditors are not satisfied of the legality of this commission, it is for them to petition. The assignees are in the nature of stake-holders between the bankrupt and the creditors, and cannot set aside the instrument, by which they are constituted. Should this petition be allowed, a bankrupt has nothing more to do, than to procure his friends to be chosen assignees, and call upon the petitioning creditor to give further information—perhaps beyond his power, and wholly unnecessary—and then commence proceedings to overthrow the commission. This is in fact the bankrupt's petition. If this is established as a precedent, no assignee will execute the trust, until a *quia timet* petition has been presented, or trial had, to prove, that there exist all the requisites to support the commission.

Ex parte
GRAVES.
In the matter
of
WESTON.

The LORD CHANCELLOR.

If the Vice Chancellor was wrong in his decision, the blame ought to attach upon me; for, in the conversation to which His Honor alluded, I certainly intimated an opinion, that assignees could not present such a petition; I am satisfied, however, that I stated the rule too broadly.

I believe, that cases have occurred, where assignees, finding they could not support the commission by the act of bankruptcy upon the proceedings, have procured it to be superseded, and a new commission to be issued upon a subsequent act of bankruptcy. This, however, is a new case, and, in principle, extremely important. I am not sorry the question has been agitated. For although such applications must be watched with great jealousy, it is the duty

of assignees, as soon as possible, to be assured, that the ground, upon which their first steps are taken, is secure. For this end, it is a fixed rule, that the petitioning creditor is bound to give every information in his power, upon every subject which comes within his knowledge as petitioning creditor; by the very act of issuing a commission, he stands pledged to establish its validity. In this case, I think the commissioners have acted hastily, in finding the bankruptcy: but suppose a petitioning creditor swears roundly to his debt, and proof of an act of bankruptcy is put upon the proceedings; mere belief authenticated, as in this case, by part of the contents of a paper not produced; the proceedings remain in the power of the commissioners, till the choice of assignees; and frequently the assignees are not present at their election: But if, after they are appointed, when they have the power of examining the proceedings, looking to the insufficient evidence put upon the proceedings, they feel doubtful of the petitioning creditor's debt, and the act of bankruptcy, are they not to call upon the petitioning creditor to produce his proof, and is not the petitioning creditor bound to give explanation upon explanation, until the whole difficulty be cleared up. There is no doubt, but the assignees have a right to call upon him for such explanation, and the petitioning creditor must, to the extent of his power, satisfy their minds. In demanding this explanation, they are aiding the commission—aiding the trust; With a view to sales of the bankrupt's property, and actions at law, this is absolutely necessary: They must prove the petitioning creditor's debt and act of bankruptcy; which it would be impossible to do under such circumstances as these.—Should the rule laid down by the Vice Chancellor be admitted, the

1821.

Ex parte
GRAVES.
In the matter
of
WESTON.

1821. consequence would be, that matters would go on, till the creditors became involved, and the evil was past remedy. I shall not be disposed to favor petitions of this nature, unless it be manifest, that the assignees have done all in their power, before they apply to this court: but I again say, I am not sorry this discussion has taken place; for it will instruct assignees that their first duty is to satisfy themselves, that the commission is well founded. It would perhaps be going too far to supersede the commission upon the statement now before us. The course must be, that the commissioners be directed to call a meeting for the purpose of receiving the information of the petitioning creditor, and upon the sufficiency or insufficiency of such information, the superseding of the commission must depend. The principle to be established by this petition is important, but I shall not to-day give my decision; though I do not think my present opinion will change.

August 29. The LORD CHANCELLOR

Said, that, after considering this case with much attention, his opinion remained the same as that he had already delivered.

LINC. INN, *Ex parte* PROWSE, — In the matter of PROWSE.
July 2,
1821.

Though the commission is not opened, the petitioning creditor cannot proceed at law, if it is capable of prosecution. Where a commission is not prosecuted so far as to give an interest in it to others, the petitioning creditor may obtain a *supersedeas* as of course; unless the bankrupt oppose.

The commission issued against *Prowse* and his partners on the 11th of April, 1821, on the petition of *Ayshford Wise* and others. After the issuing of the commission, the petitioning creditors commenced an action against *Prowse* for the recovery of their debt, and, on the 14th of May, 1821, caused him to be arrested in the action for the sum of £3000, the amount of their demand.

1821.

Ex parte.
Prowse.
In the matter
of
Prowse.

The commission had not been opened, and the time limited for its prosecution, under Lord *Loughborough's* order, had expired before the arrest.

It was attempted to be shewn in answer to the petition, that it had been agreed between *Prowse* and the petitioning creditors, and others of his creditors, that all proceedings under the commission should be abandoned.

Mr. Heald and *Mr. Wakefield* for the petition.

Mr. Bell and *Mr. Knight*, against it, said it was a mere question of election: that the petitioning creditor was not conclusively bound not to proceed at law by suing out a commission, unless he had prosecuted it so far, as to give an interest to others: that there was no case, in which the petitioning creditor had been put to his election, where the commission had not proceeded to the choice of assignees; and they referred to *ex parte Lewis*, 1 *Atk.* 153, where Lord *Hardwicke* rests his opinion against the election of the petitioning creditor to proceed at law, upon this ground, that the commission must then be superseded, and the interests of creditors who had proved, would be

1801. affected; a reason not applicable to an unopened commission.

Ex parte
Prosser.
 In the matter
 of
Prosser.

The VICE CHANCELLOR.

You must satisfy me, not only that you have not proceeded in the commission, but that you cannot proceed. The agreement here was, that the proceedings under the commission should be suspended, and not that they should be abandoned; and so long as the commission is capable of prosecution, the petitioning creditor cannot bring an action. Where a petitioning creditor has not prosecuted his commission so far as to give an interest in it to others, it would be a matter of course to supersede it upon his application, unless the bankrupt should oppose it, and should himself pray a *superedeas* with an assignment of the bond.

Ordered that the petitioning creditors should forthwith do all necessary acts for the discharge of the petitioner from the arrest (a).

The commission was subsequently superseded with costs, on the petition of the petitioning creditors (b).

(a) No costs were given: that statute. See *ex parte Cris-*
the petition was informal, *soz*, 1 Bro. C. C. 270; *ex*
 being entitled in the matter of *parte Wilson*, 1 Ath. 152; *ex*
Prosser only. It is part of the *parte Ward*, *ibid*; *ex parte Hop-*
 condition of the petitioning cre- *kinson*, 2 Ves. Jun. 159; *Oliver*
 ditor's bond, that he will cause *v. Ames*, 8 T.R. 364.

(b) The bankrupts appeared
 according to the directions of upon this petition. See *supra*,
 5 G. 2, c. 30, and see s. 23 of p. 27. *Anon.*

Ex parte WALKER.—In the matter of SYKES. LINC. INN.
July 31,
1821.

PETITION by a creditor to tax the bill of costs of the solicitor to the commission. A creditor cannot apply to have the solicitor's bill taxed, except on the ground of neglect of duty by the assignees.

Mr. *Montagu* for the petition.

Mr. *Agar* and Mr. *Duckworth* for the solicitor.

THE VICE CHANCELLOR.

This creditor is taking upon himself the office of the assignees. He may do this, if he charges them with a dereliction of their duty, but not otherwise.

Mr. *Montagu* said, it had been the practice for creditors to present petitions of this nature, where there had been a mal-administration of the estate, and cited *ex parte Tollett*; and *ex parte Lee*, MS. cases.

THE VICE CHANCELLOR.

In the cases cited, the assignees were charged with neglect of their duty. A creditor has no right, upon other grounds, to interfere in the administration of the bankrupt's estate, and, in such cases, he must serve the assignees with the petition. If this petitioner can make a case of neglect on the part of the assignees, I will permit the petition to stand over, in order that the assignees may be served; the petitioner paying the costs of the day; otherwise I must dismiss the petition with costs.

LINC. INN, *Ex parte* FRY.—In the matter of JOHN and
 July 31,
 1821. JAMES ASPINALL.

One of three partners assigns his interest in the partnership property to the two continuing partners, who covenant to pay the debts of the three, and afterwards become bankrupt: held, that joint creditors of the three were not entitled to prove against the estate of the two.

PREVIOUS to August, 1813, *Fry and Co.* were creditors of *John, James, and William Aspinall*, carrying on business under the firm of *John Aspinall and Sons*. In August 1813, *William* retired from the partnership, and, by deed, assigned all his interest in the partnership property to *John and James*, who covenanted to pay the partnership debts. *John and James Aspinall* continued to carry on the business in partnership. In June, 1816, *John and James Aspinall* became bankrupt, and in August, 1816, *William Aspinall* became bankrupt.

This was a petition by *Fry and Co.*, claiming to prove against the estate of *John and James Aspinall*, upon the ground, that there was no joint estate of the three; and that they, *Fry and Co.*, might elect, whether they would adopt or reject the agreement between *John, James, and William Aspinall*, of August, 1813.

Mr. *Montagu*, for the petition, stated, that *ex parte Freeman (a)*, which was a contrary decision of his Honor the Vice Chancellor, had been overruled upon appeal.

Mr. *Cullen, contra*, said, that by some misappre-

(a) *Buck*, 471.

hension the petition of appeal in that case had been disposed of without any argument. 1821.

The VICE CHANCELLOR.

The case of *ex parte Freeman* was very fully considered by me, and is now in print. If that case were afterwards, by some misunderstanding, disposed of upon appeal without argument, then the only course which I can take is, respectfully to submit this important question to the consideration of the Lord Chancellor, by making a similar order upon this petition.

Ex parte
FRY.
In the matter
of
ASPINALL.

Ex parte HOLDING. — In the matter of LINC. INN,
HOLDING. July 31,
1821.

PETITION by the bankrupt to supersede for want C., before the act of bankruptcy, accepts, for the accommodation of the bankrupt, a bill of exchange drawn by him, and after the act of bankruptcy pays the amount of the bill to I. S., to whom it had been negotiated; held, that such payment did not constitute a good petitioning creditor's debt.

On the 30th of September, 1820, *Cook* accepted, for the accommodation of *Holding*, a bill for £143, drawn by him; which became due on the 2d of February, 1821. *Holding* surrendered himself to prison, on the 26th of January, 1821, in discharge of his bail, and lay in prison more than two months. When the bill became due, it was in the hands of a third person, to whom *Cook*, on the 29th of March, paid the amount of the bill; which was thereupon delivered up to him; and on the 3d of April, *Cook* sued out a commission upon the above-mentioned act of bankruptcy.

1821. **Mr. Montagu and Mr. Wakefield**, for the petition, argued, that when the acceptor paid the bill, he destroyed the old debt, and created a new one; that the new debt, being created subsequently to the act of bankruptcy, could not support a commission; that *Cook* was a surety, and, before the 49 G. 3, c. 121, could not even have proved; that *Cook* could not have sued at law upon the bill, but only for money paid. *Snaitk v. Gale*, 7 T. R. 364.

Ex parte
HOLDING.
In the matter
of
HOLDING.

Mr. Lovat, contra, contended, that *Cook*, by paying the acceptance, became in the nature of endorsee or purchaser for a valuable consideration before the issuing of the commission: that the holder of the bill, though it were endorsed to him after the act of bankruptcy, might have issued a commission; and there was no reason why *Cook*, by paying the bill, should not derive the same right. And he cited *Glaister v. Hewer (a)*, where Lord *Kenyon* says, "All that the act of parliament requires is, that there should be an existing debt of £100, in the petitioning creditor. Then when is this debt to exist? at the time of petitioning. It has been several times decided, and indeed admitted in this case, that it is not necessary that the debt should exist in the petitioning creditor at the time of the act of bankruptcy."

Mr. Montagu said, that the law in *Glaister v. Hewer* was much doubted.

THE VICE CHANCELLOR.

The petitioning creditor here was a mere surety for the bankrupt by the acceptance of an accommoda-

(a) 7 T. R. 498.

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99

tion bill; when he paid that bill, and not till then, he became a creditor of the bankrupt, and this payment, being made by him after the act of bankruptcy, could not create a debt to support a commission.

1821.

—
Ex parte
HOLDING.
In the matter
of
HOLDING.

Commission superseded.

Ex parte **BRADSHAW.**— In the matter of
AUBREY.

LINC. INN,
August 1,
1821.

PETITION by joint creditors to prove against the separate estate, there being no joint effects or solvent partner; and the question was, by whom the costs of such petition and order were to be borne.

No costs given,
upon a petition
by joint credi-
tors to prove
against the
separate estate,
there being no
joint effects or
solvent partner.

The **VICE CHANCELLOR** ordered the practice to be inquired into at the bankrupt office. Several orders were produced upon such petitions, by which it appeared, that, in these cases, the party applying bore his own costs.

The **VICE CHANCELLOR**, thinking such practice reasonable, made the order, but gave no costs. /

LANC. INN, *Ex parte PAGE.*—In the matter of *PAGE*.
 Aug. 16,
 1821.

By deed of the 10th of June, 1780, made on the marriage of the bankrupt, his estate was limited to himself for life, remainder to his wife for life, remainder to T. G. for 500 years, in trust, in case the wife should die in the life-time of her husband, without issue between them, to raise by sale or mortgage, after the death of the husband, £300., and pay the same as the wife should by deed or will appoint.

PETITION by the bankrupt to supersede, for want of a petitioning creditor's debt.

By indenture of settlement of 10th June, 1780, made upon the marriage of the petitioner with *Mary* his wife, then *Mury Guest*, (the sister of the petitioning creditor), the petitioner conveyed an estate to the use of himself for life, with remainder to *Mary* his intended wife for her life, remainder to the use of *Thomas Guest* for 500 years, upon trust, in case *Mary Guest* should die in the lifetime of her husband, without issue between them, by sale or mortgage of the term of 500 years, after the decease of the petitioner, to raise the sum of £300, and pay the same, as *Mury* his wife should, by deed or will, appoint.

In June, 1809, there being no issue or probability of issue, the petitioner and his wife being each of the age of 86 years and upwards, the petitioner borrowed £500, £500, and; to secure the repayment thereof, the petitioner and his wife, after levying a fine, executed a mortgage of the estate, in which they were joined by *Thomas Guest*; and the petitioner gave *Thomas Guest* his promissory note for £200, payable on demand, as part of the sum of £300, secured by the settlement, and subject to the trusts thereof.

Upon this promissory note *Thomas Guest* sued out the present commission.

T. G. has promissory note for £200, payable on demand, as part of the sum of £300, secured by the settlement. Held, that the promissory note was not a good petitioning creditor's debt.

Mr. *Wilbraham*, for the petition, contended, that this was a contingent debt, and that a court of equity would have restrained the petitioning creditor from proceeding at law upon the promissory note.

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Mr. *Treslove*, *contra*, insisted, that all chance of issue being past, and the wife having joined in the mortgage, this court would not interfere with the legal rights of the parties, and that the note was a present and absolute debt.

The VICE CHANCELLOR.

The promissory note is, in form, a present debt, but, in substance, it is a security for a contingent debt, which can only become due, if the wife die before her husband. I think this court would have restrained an action brought upon this promissory note, and that it is not, therefore, a debt to support a commission.

This commission, therefore, must be superseded at the costs of the petitioning creditor.

Ex parte THE VAUXHALL BRIDGE COMPANY.—In the matter of LEYBURN.

LINC. INN,
Aug. 1821.

THE Vauxhall Bridge Company, claiming to be equitable mortgagees of certain shares in that company belonging to the bankrupt, presented this petition, praying a sale.

Shares in the
Vauxhall
Bridge Com-
pany, who are
seized of real
estate, not with-
in the statute

21 Jac. 1. c. 19. s. 11. Equitable mortgagees held to be entitled to costs, out of the proceeds, upon the usual petition for sale, though the written instrument referred to, and required the aid of, parol testimony to explain it.

1821. It appeared, that, under the powers of two acts of parliament, passed in the 49th and 52nd years of the late king, 400 shares in the Vauxhall Bridge Company had been issued and sold, at the rate of £45. per share, to be paid for by monthly instalments of £5.; that *Leyburn* had subscribed for 200 of those shares, but had paid only part of the purchase monies, leaving a balance of £3,000. unpaid; that the whole of the purchase monies ought to have been paid by the 16th of July, 1816; that, by order of the committee, Mr. *Nash*, the clerk of the company, drew two bills of exchange upon *Leyburn* for £1,500. each, payable at 3 and 4 months, and that they were accepted by *Leyburn*, but were dishonored; that, upon application on the part of the company for payment of those bills, *Leyburn* wrote to Mr. *Nash* the following letter.

—
Ex parte
 The VAUX-
 HALL BRIDGE
 COMPANY.
 In the matter
 of
LEYBURN.

“Bishopsgate Within, Dec. 21, 1819.

“Sir,—I have had conversation with Mr. *Shree* on the subject of my shares, and have informed him, they shall be replaced, it being the furthest from my thoughts the said two bills would not be paid: the first would, had it been required. This is to say, I wish you to put all such shares as you know belong to me to the credit of the company, so as to cover the £3,000, at the price of the last issue, also the ten shares standing in the name of Mr. *Philip Thompson*, on the committee returning me the said two acceptances.”—This letter, by mistake, was dated the 21st Dec. 1819, instead of 21st Dec. 1818.

A minute of the contents of *Leyburn's* letter was entered on the proceedings of the committee of the company, and approved.

At the time of writing this letter, *Leyburn* was entitled to 46 shares in the company's stock, although nine only were standing in his name in the books of the company. The other 37, having been purchased by him, but not actually transferred into his name, were in the names of ten other persons.

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Ex parte
The VAUX-
HALL BRIDGE
COMPANY.
In the matter
of
LEYBURN.

In November, 1819, *Leyburn* became bankrupt, no part of the £3,000. having been paid.

Mr. *Montagu* for the petition.

This is a clear case of equitable lien: The only question that can be raised is, whether it falls within the meaning of the statute of *James (a)*; it clearly does not: for even before the assignment by the letter of the 21st December, 1818, the reputed ownership of the 37 shares never rested in *Leyburn*, but in the ten other persons in whose names the shares were entered in the books of the company. They had never been publicly transferred to him, according to that section of the act (*b*), which prescribes the mode of conveying the property in the shares from the company to the

(a) 21 Jac. 1, c. 19.

(b) By the 40th section of the 49 G. 3, c. 142, the company are required to cause the names and proper additions of the several persons entitled to any share or shares in the undertaking, to be entered in a book, to be kept by the clerk of the company, and after such entry made, to cause their common seal to be affixed

thereto, and also to cause a certificate or instrument, with the common seal of the company affixed thereto, to be delivered to every subscriber upon demand, specifying the shares he is entitled to; but the want of such certificate or instrument is not to prevent the proprietor of any shares from disposing thereof.

1821. purchaser; *Leyburn* was never the ostensible proprietor of them. The cases of *Mair v. Glennie* (a), and *Gordon v. East India Company* (b), are in point. After the letter assigning the shares, could *Leyburn* have made a valid transfer to another, without paying the debt for which they were given as a security. The assignees contend, that there are certain formalities prescribed by the act, as to the transfer of shares (c), which have not been complied with; but this provision of the act does not apply to transfers made to the company. If application had been made at the company's office, who would have appeared to be the proprietor? Certainly not *Leyburn*.

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The VAUX-
HALL BRIDGE
COMPANY.
In the matter
of
LEYBURN.

Mr. *Bell*, for the assignees, contended, that the company could have no lien upon any of the shares, as the regulations (c) of the act respecting their transfer, the compliance with which constituted the only evidence of title, had never been performed; and that, if there was any lien, it could only be upon the

(a) 4 M. & S. 240.

(b) 7 T. R. 233.

(c) 49 G. 3, c. 142, section 38, it is declared, that the proprietors of the undertaking may dispose of any shares, to which they may be entitled, and the conveyance of such shares is to be in the form therein mentioned, and that, on every such sale, the deed or conveyance (being executed by the seller and purchasers) shall be kept by the purchaser for his secu-

urity, after the clerk of the company shall have entered, in a proper book to be kept for that purpose, a memorial of such transfer and sale, for the use of the company, and have endorsed the entry of such memorial on the said deed of sale, and until such memorial shall have been so made and entered, such purchaser shall have no part of the profits, nor any interest for such shares, nor any vote in respect thereof as a proprietor.

nine shares standing in *Leyburn's* name, and not upon the 37 shares; that the words of *Leyburn's* letter, assigning "all such shares as you know belong to me," could not possibly extend to those, of which, though he was the actual, he was not the ostensible proprietor: that the company, not having complied with the regulations of the act, had not shewn whether they accepted the shares from *Leyburn*.

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The VAUX-
HALL BRIDGE
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LEYBURN.

The VICE CHANCELLOR said, that *Leyburn* never had any thing more than an equitable interest in the 37 shares, and with that he had clearly parted: and directed a reference to the master to inquire, what shares were intended to pass, by the expression of the bankrupt, "all such shares as you know belong to me."

The master reported, that the nine shares standing in *Leyburn's* name, and fourteen other shares in the said company, (in which 23 shares *Leyburn* was alone interested), and also 23 shares therein, (the transfer deeds or certificates whereof had been, previous to the writing of that letter, but without the knowledge of Mr. *Nash*, delivered over to creditors of *Leyburn*, for securing monies advanced to him), were intended to pass by the expression in that letter above mentioned.

The Vauxhall Bridge Company presented a petition to have the report confirmed; and prayed a sale of the 23 shares, in which the bankrupt was alone interested, and to have their costs of the original petition, of the inquiry, and of this petition paid out of the proceeds.

1821

16th August, 1821.

Ex parte
The VAUX-
HALL BRIDGE
COMPANY.
In the matter
of
LAYBURN.

The VICE CHANCELLOR confirmed the report, stating, that the shares were not within the statute of *James*, as the Bridge Corporation were seized of real estate—and adding, that if the shares were within the statute of *James* generally, this case might form an exception, because the Company being to have the lien had necessarily notice.

The VICE CHANCELLOR at first inclined to consider this case, as to costs, within the rule of parol deposits, upon the ground that parol evidence was here necessary to identify the deposit; but ultimately adhered to the general rule, to give costs out of the proceeds, where there is a written document.

GENERAL ORDER IN BANKRUPTCY.

15th August, 1821.

IT is ordered by the Lord Chancellor, that in affidavits made in support of applications for the direction of commissions of bankrupts, to be executed in the country, to five attorneys, instead of two barristers as quorum commissioners, and three attorneys; in addition to the circumstances of there not being two barristers resident within twenty miles of the place at which it is intended the commission should be executed, or not two barristers within twenty miles, who, as the deponent verily believes, will be willing to attend, it be further stated, “That the deponent verily believes there are not any two barristers who will be

willing to attend at [specifying the place at which it is intended the commission shall be executed], or at any convenient place in the neighbourhood thereof, to act under the said commission for the fees allowed by the statute."

The Secretary of Bankrupts is authorized to prepare fiats accordingly, on affidavits, distinctly stating the above particulars, being filed, without any other application made to the court.

Ex parte HAYNES. — In the matter of *HAYNES.* LINC. INN,
August 27,
1821.

PETITION by the bankrupt to be discharged out of A ere ditorof
custody. the bankrupt,
previous to the
commission,

The petition stated, that at the Spring Assizes for 1821, in an action for money had and received, brought by one *Bardswell* against the petitioner, a verdict by consent was taken for the plaintiff for a nominal sum, subject to a reference, which was made a rule of court: that, on the 26th of May, 1821, before the arbitrator had made his award, the commission issued: that, on the 17th of July, 1821, after the award made, judgment was entered up in the action for £459: 10: 11, and £118: 19: 6, the debt and costs awarded: that, the creditor having proved his debt took the bankrupt in execution for the costs: ordered to discharge him.

obtained a
verdict against
him for a no-
minal sum, in
an action for
money had and
received, sub-
ject to a refer-
ence. After the
issuing of the
commission the
award was
made, and
judgment en-
tered up for
the debt, and
costs awarded;

1821. on the 21st of July *Bardswell* proved his debt of
 ————— £459:10:11, and after the proof took the petitioner
Ex parte in execution on the judgment for the costs.
 HAYNES.
 In the matter
 of
 HAYNES. Mr. *Agar* and Mr. *Twiss* for the petition.

Mr. ———, *contra*.

The LORD CHANCELLOR ordered the petitioner to be discharged: and that *Bardswell* should pay the costs; unless he could produce an affidavit that the commissioners had stated to him, that he had a right to seize the person of the bankrupt (*a*).

LINC. INN,
 August 31,
 1821.

Ex parte HUSBAND.—In the matter of
 TWYNAM.

Commissioners **A** COMMISSION issued against *Twynam*, residing
 ought not to at Plymouth. In this petition, which prayed a *super-*
 make affidavits, unless they are served with the petition.

(a) By the 49 G. 3, c. 121, *Foots, Comp.* 138. *Graham v. Benton, Str.* 1195. S. C. 1 *Wils.* 41. *Lewis v. Piercy*, 1 *H. Bl.* 29. *Cullen's B. L.* 106. *Ayllett v. Harford*, 2 *Blacks.* 1317. *Beeston v. White*, 7 *Price*, 209. *Dinsdale v. Eames*, 2 *Brod. & Bing*, 8; but see *ex parte Hill*, 11 *Ves.* 646; *ex parte Todd*, cited 3 *Wils.* 270, and *Walter v. Sherlock*, cited 3 *Wils.* 272. and whether the costs were proveable, *Quare*.

sedeas, were passages which the commissioners considered as reflecting upon their conduct; and they made affidavits in answer, but were not served with the petition. The petition was dismissed: and application was made for the costs incurred by the commissioners in filing those affidavits.

1821.

Ex parte
HUSBAND.
In the matter
of
TWYNAN.

The LORD CHANCELLOR,

I have observed, that there are many parts of this, as well as of a former petition in the same matter, reflecting upon the conduct of the commissioners; I therefore anxiously seize this opportunity of saying, that commissioners ought in no case to make affidavits, in answer to a petition, unless they are actually served with such petition; in that case they are made parties, and may properly come forward and defend their conduct upon affidavit; there would then be no difficulty, should the charges be well founded, in this court's doing its duty: if, on the other hand, the imputations proved to be groundless, they would have justice done them, at least, with respect to their costs and expenses. This, however, cannot be done in the present case, where, without having been served, they have thought proper to make themselves a species of witnesses, not only with respect to their own conduct, but as to the general nature of the transactions under the commission. I wish my opinion to be intimated to commissioners in general,—that they ought not to offer themselves as they have done here, but to take it for granted, that the court will give them credit for having acted properly, unless such a case appears upon the petition, as induces the court itself to call upon them for an explanation of their conduct.

LINC. INN, *Ex parte* TAAFFE and another. — In the matter of
Septemb. 4,
 1821. **MACDONNELL and BUSHELL.**

By settlement **BY** indenture of settlement of Feb. 23, 1815, executed previous to the marriage of *John Macdonnell*, and *Catherine Taaffe*, after reciting, that it had been agreed that *John Taaffe* (father of the said *Catherine Taaffe*), and *John Macdonnell*, should each of them transfer to the trustees therein named, the sum of £3000, government stock, and that *John Macdonnell* should execute his bond with warrant of attorney for confessing judgment, in the sum of £2000, upon the trusts and purposes, and subject to the powers, provisions, and agreements thereafter declared concerning the same; and that in pursuance of such agreement the said *John Taaffe* for himself, and *Randal Macdonnell* (father of *John Macdonnell*), on behalf of the said *John Macdonnell*, had each of them transferred £3000, government stock, to the said trustees, and that *John Macdonnell* had executed a bond with warrant of attorney for confessing judgment thereon in the sum of £2000, it was witnessed, that in order to make a provision in the nature of a jointure for the said *Catherine Taaffe*, in case she should survive her intended husband, they the said *John Taaffe*, *Randal Macdonnell*, and *John Macdonnell*, were thereby assigned to the said trustees, the respective sums of £3000, making in the whole £6000 stock, upon trust, that the said trustees, or the survivor, &c. should pay (given by the bankrupt to the trustees) in trust assigned to the said trustees, the respective sums of £3000, making in the whole £6000 stock, upon trust, that the said trustees, or the survivor, &c. should pay if there should be no issue of the marriage, or being such, all should die in the lifetime of the bankrupt, as therein mentioned, after the death of the bankrupt, if the wife should survive, to raise the sum of £2000, and pay the interest thereof to the wife for life, by way of increase to the provision therein before made for her in the nature of jointure, in the events therein-before mentioned: and in case of issue of the marriage living at the death of the bankrupt, the bond was to be delivered up to be cancelled:— Held, (the wife living and no issue), that the bond was not proveable.

the interest, dividends, and annual produce thereof to *John Macdonnell* and his assigns during his life, or until he should become bankrupt, for his and their own use and benefit, and, immediately from and after his decease, or from the time of his becoming bankrupt, (should such event happen), if *Catherine Taaffe* should be then alive, then to pay the same to her, for her support, and on her receipt, notwithstanding her coverture, the same after the death of the said *John Macdonnell* to be in the nature of her jointure and in bar of dower. And it was further agreed, that the trustees and the survivor, &c., should stand possessed of the bond thereinbefore mentioned, upon trust, in case there should be no issue of the said intended marriage, or being such they should all die in the lifetime of *John Macdonnell*, being a son or sons before the age of twenty-one years, or being a daughter or daughters, before that age, and without having been married, after the decease of *John Macdonnell*, in case *Catherine Taaffe*, his intended wife should survive him, to raise the sum of £2000, and lay out the same on government or real securities, and pay the interest or annual produce thereof to *Catherine Taaffe*, by way of increase to the provision therein before made for her, in the nature of jointure, in the events therein-before mentioned; and it was thereby further agreed, that if there should be issue of the said marriage, living at the decease of *John Macdonnell*, then, and in such case, the bond should be delivered up to his executors to be cancelled, and if any judgment should have been entered thereon, satisfaction should be entered on the record thereof.

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—
Ex parte
TAAFFE and
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In the matter
of
MACDONNELL
and BUSHELL.

The bond was delivered to the trustees; and the marriage was solemnized. In December, 1818, a commission of bankrupt issued against *John Macdonnell*,

1821. and his partner Bushell. The trustees under the settlement, (the wife living and no issue of the marriage), petitioned to prove the amount of the bond against *John Macdonnell's* separate estate. Their petition was heard before His Honor the Vice Chancellor, and dismissed: — His Honor being of opinion, that the debt upon the bond was a contingent debt.

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The petitioners appealed: and the case was argued before the Lord Chancellor, upon the settlement itself, as well as upon the statement in the original petition (a).

Mr. *Horne* and Mr. *Rose*, for the petition, contended, that as the bond was absolute before the commission issued, there was an immediate debt at law, which was sufficient to render the proof admissible; and they cited *ex parte Groome* (b), *ex parte Winchester* (b), *ex parte Mitchell* (c), and *ex parte Rowlatt* (d), in which cases the court made a present legal debt, a mode of enforcing an equitable demand: feeding, as it were, the equitable out of the legal demand.

Mr. *Hart* and Mr. *Montagu*, *contra*.

This debt is not proveable under the commission; first, because it is not available at law, inasmuch as the covenants in the settlement operate as a legal defeazance of the bond; and secondly, because, if it

(a) The original petition stated only such part of the settlement as related to the bond.

(b) 1 *Atk.* 115.

(c) 1 *Atk.* 120.

(d) 2 *Rose* 416.

were a debt available at law, a court of equity would not allow it to be proved, depending as it does upon a contingency which may never become vested: as, in the event of there being issue living at the death of *John Macdonnell*, the bond and judgment were to be cancelled. There is no case where a debt, depending upon a contingency, is proveable, by virtue of the legal debt, unless the money is at all events to be paid, though the time at which such payment is to take place be uncertain. *Ex parte Groome* (a) is a case of this nature; and *ex parte Mitchell* (b), where Lord Hardwicke says,—“ Unless you can make it *debitum* “ *in præsentì, solvendum in futuro*, the petitioner “ will not be entitled to prove it.”

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an otl.er.
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The LORD CHANCELLOR.

The settlement relates not only to the bond, but to £6000 money actually paid; and with respect to such £6000, there are very cautious provisions in the settlement as to the event of the bankruptcy of *John Macdonnell*.—The words are, “ Upon trust, &c.” (Here his Lordship read the above-stated trust of the £6000 stock.)

Mr. Montagu.—The bond and settlement are to be considered one instrument, *Ex parte Murphy*, 1 Sch. & Lefr. 49.; and a marriage bond, payable by a bankrupt in the event of his bankruptcy, is proveable only to the extent of the sum received from the wife, *Ex parte Hill, Cooke*, 238. 7 Ed. 1 Cox, 300. *Ex parte Bennett, Cooke*, 240. 7 Ed. *Ex parte Hency*, 1 Scho. & Lefr. 46. *In re Meaghan*, 1 Scho. & Lefr. 179. *Ex parte Oxley*, 1 Ball. & Bea. 257.

(a) 1 Atk. 115.
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(b) 1 Atk. 120.

1821. *Gardner v. Shannon*, 2 Scho. & Lefr. 228. *Ex parte Hinton*, 14 Ves. 598. *Ex parte Alcock*, 1 Ves. & B. 179.

Ex parte
TAAFFE and
another.
In the matter
of
MACDONNELL
and BUSHNELL.

This bond is not in consideration of the £6000:— It is wholly distinct from it. It is a bond by the husband, not in consideration of his wife's property, but to be operative, if operative at all, "by way of increase to the provision thereinbefore made for the wife in the nature of jointure;" that is, in the event of his bankruptcy or death during her life, and therefore is not proveable within *ex parte Murphy* (a), and that class of cases.

THE LORD CHANCELLOR.

As the judgment of His Honor the Vice Chancellor is founded upon that part of the settlement only which is contained in the petition, I think it right to state, that my opinion depends, not only upon such allegations, but upon the settlement itself, which, and particularly with reference to the bond, I have again and again carefully examined.

The settlement may be considered, — First, as it relates to the £6000 stock; — Secondly, as it relates to the bond. With respect to the £6000 stock, it must be observed, that all the covenants contain a condition to be observed in the event of the bankruptcy, the words of which are as follows: — "That the said trustees, and the survivor &c., shall pay the interest, dividends, and annual produce of the said stock or funds unto the said *John Macdonnell*, and his assigns, during the term of his life, or until he shall become bankrupt, for his and their own proper use and benefit, and immediately from and

(a) 1 Scho. & Lefr. 49.

" after the decease of the said *John Macdonnell*, or
 " from the time of his becoming bankrupt, (if such
 " event shall happen), if the said *Catherine Taaffe*,
 " his intended wife, shall be then alive, for her sup-
 " port, &c."

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TAAFFE and
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 and *BUSHELL*.

With respect to the bond, it is indeed absolute, and payable at a day long since passed; and passed before the bankruptcy: and, in addition to this, there was a warrant of attorney to confess judgment.— If there were not any thing more in the case, it would be difficult, I might perhaps say, not possible, to distinguish this from the cases, where the court has rather anxiously availed itself of the legal right of the parties to admit a proof, which in equity ought to be admitted: but it must be remembered, that the events, upon which these instruments are to be available, are those referred to in the words, " by way of increase to the provision hereinbefore made for her in the nature of jointure;" which relates to the conditions I have already mentioned respecting bankruptcy.

Now, without enquiring whether the settlement would operate as a legal defeazance, so as to induce a court of law to stay execution upon any judgment which might have been issued on the bond, (of which I wish to be understood, that I do not say any thing,) it appears to me, that, upon the construction of the settlement, having regard to its being a bond to pay, " to the trustees the sum of £2000, for the trusts and purposes, and subject to the powers, provisoes and agreements thereafter declared," and that this bond is not for the repayment of a sum of money advanced to the bankrupt, I must

1821. consider it within the principle of *Ex parte Murphy* (a), and that class of cases.

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TAAFFE and
another.

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of

MACDONNELL
and BUSHELL.

I am, therefore, of opinion, that the judgment of His Honor the Vice Chancellor must be affirmed: but with liberty to the appellants to have the case reheard without the expense of a new petition, provided they notify their intention to me, on or before the petition day of next term (b).

LINC. INN, *Ex parte* MEUX,

August,
1821.

Ex parte CAWTHORNE. } In the matter of FOOT.

Messrs. M. & Co. being in possession of all the title deeds of certain leasehold premises belonging to the bankrupt, as a security for a debt due from him, at his request,

deliver to the solicitor of the original lessor, upon an engagement of re-delivery, the original lease and the immediate assignment to the bankrupt, for the purpose of enabling the bankrupt to procure an extension of the term of the lease. The bankrupt receives the lease and assignment from the solicitor of the original lessor, and deposits them with Messrs. C. & V. as a security for money advanced. After the bankruptcy, Messrs. C. & V., upon payment of their claim thereon, deliver the lease and assignment to the assignees under the commission. Held, that Messrs. M. & Co. were, in equity, to be considered as in possession of the lease and assignment, and that they had, therefore, a priority of lieu.

THE first petition was by Messrs. *Meux* and *Co.* brewers, who claimed to be equitable mortgagees of certain leasehold premises of the bankrupt; and it prayed the usual order for the sale of the premises, and the application of the proceeds towards the discharge of their debt, and to be admitted creditors under the commission for the residue.

(a) 1 *Scho. & Lefr.* 49.

(b) This case was afterwards re-argued by Mr. *Horne* and Mr. *Rose*, for the petition; and on the 24th of January, 1822, the

Lord Chancellor confirmed his previous judgment; but ordered the costs of the petition to be paid out of the estate.

By that petition and the affidavits in support of it, it appeared, that, in the year 1816, the bankrupt contracted for the purchase of the leasehold premises in question, being a public house, situate in Fenchurch-street, in the city of London, held by lease of the Skinner's Company; and that, having occasion to borrow £500 to enable him to complete the purchase, he applied to Messrs. *Meux* and Co. to lend him that sum; that Messrs. *Meux* and Co. agreed to advance it, provided the bankrupt would execute to them a warrant of attorney, and deposit with them the lease, assignments, and title deeds of the premises, as security for the repayment of the £500 and interest, and such other sum as they might lend, or might become due to them for goods sold, not exceeding in the whole the sum of £1000: that the bankrupt acceded to these terms, and Messrs. *Meux* and Co. advanced to him the £500, and he deposited with them the original lease, the assignment to him, and the intermediate assignments, and executed a warrant of attorney for £1000: that the bankrupt, being desirous of obtaining an extension of the term of the premises, applied to the Skinner's Company for that purpose; and, it being required that the immediate assignment to him should be registered with the Skinner's Company, the bankrupt requested the solicitor of Messrs. *Meux* & Co., who had possession of the deeds for them, to send that assignment to Mr. *Gregg*, the clerk of the Skinner's Company, for the purpose of having it registered; and that assignment was accordingly sent to Mr. *Gregg*, who was, upon its delivery, informed, that it was not to be given to the bankrupt, but must be returned to the solicitor of Messrs. *Meux* and Co.: that the original lease was afterwards left

1821.

Ex parte
*MEUX,**Ex parte*
CAWTHORNE.
In the matter
of
Foot.

1821.

Ex parte
MEUX,
Ex parte
CAWTHORNE.
 In the matter
 of
 Foot.

with Mr. *Gregg*, with the same injunction, but that Mr. *Gregg* inadvertently delivered that lease and assignment to the bankrupt, who subsequently deposited the same with Messrs. *Child* and *Vickers*, as a security for a small sum which they had lent him; that the intermediate assignments had remained with Messrs. *Meux* and *Co.*, and that there was due to them £461:4:4. for money lent, and £162:19s. for goods sold.

By the affidavit of the bankrupt, and *William Cawthorne*, one of the assignees, it was stated, that, in the defeazance of the warrant of attorney, no mention was made that the lease of the premises was to be considered as a security for the loan; that the lease and other title deeds of the premises were taken away from the bankrupt's house by the agent of Messrs. *Meux* and *Co.*, but that the bankrupt never agreed, that the lease and title deeds should be deposited with Messrs. *Meux* and *Co.*, as a security for the advance, the bankrupt having previously agreed to deposit the lease with the said *Wm. Cawthorne*, as a security for £370 advanced by him to the bankrupt; that Mr. *Gregg*, by letter, desired the bankrupt to take away the lease and assignment, and the bankrupt accordingly called on Mr. *Gregg*, and received the same from him; that, afterwards, the bankrupt, having occasion to borrow £100, applied to Messrs. *Child* and *Vickers* to advance that sum, and that they lent him the same, upon his depositing with them the said lease and assignment, as a security for its repayment; that the lease and assignment remained in the hands of Messrs. *Child* and *Vickers*, at the time of the bankruptcy: that *William Cawthorne*, after the bank-

ruptcy, paid Messrs. *Child* and *Vickers* what was due to them on the security of the lease and assignment, and received the same from them, for the benefit of the bankrupt's estate.

1821.

—
Ex parte
MEUX,
Ex parte
CAWTHORNE.
In the matter
of
Roos.

Upon that petition coming on to be heard before His Honor the Vice Chancellor, it was referred to one of the Masters of the court, to inquire and state, whether Messrs. *Meux* and *Co.* had any and what equitable security on the premises, and for what consideration; and whether *William Cawthorne* had any and what preferable lien thereon, and to what extent.

The Master, by his report, stated, that he conceived that Messrs. *Meux* and *Co.* had an equitable mortgage or lien on the lease and premises, to the extent of £500, and such other sums as thereafter became due from the bankrupt to Messrs. *Meux* and *Co.*, (not exceeding £1000), for goods sold or money lent, with interest on such advances; and that there was due to them on the said security £611:12:1; and that *William Cawthorne* had not any preferable lien on the premises.

The assignees objected to this report on two grounds: first, that, as neither Messrs. *Meux* and *Co.*, nor Messrs. *Child* and *Vickers*, were in possession of the whole of the title deeds, they had neither of them any equitable lien on the premises; and, secondly, that if Messrs. *Meux* and *Co.* or Messrs. *Child* and *Vickers*, had any equitable lien on the premises, that Messrs. *Child* and *Vickers* had a priority of lien, as the deeds were deposited with them, and their money advanced thereon, without notice that Messrs. *Meux*

1820. and Co. had any lien on the deeds; and, on the footing of these objections, the assignees presented the second petition, praying, that the report might not be confirmed; or that, if there was any equitable lien on the deeds, as against the creditors of the bankrupt, that *William Cawthorne*, in respect of Messrs. *Child* and *Vickers*, and for the benefit of the creditors of the bankrupt, might be declared to have a priority of claim to Messrs. *Meux* and Co.: and this day the last petition came on to be heard.

Ex parte
MEUX,
Ex parte
CAWTHORNE.
In the matter
of
Foot.

August 16,
1821.

Mr. *Montagu* for the assignees.

Upon the principle laid down in *ex parte Pearse* (a), no equitable lien can rest, either in Messrs. *Meux* and Co., or in Messrs. *Child* and *Vickers*. I well remember arguing that case, and the Lord Chancellor's observation upon it was, that the utmost caution should be observed not to extend the doctrine of equitable lien; and that he saw no other mode of preventing as many liens as there were title deeds to be deposited.

Mr. *Cullen*, *contra*, insisted, that this case differed materially from that of *ex parte Pearse*, where only a part of the title deeds had been deposited with either of the parties; but that here a perfect title had once existed in Messrs. *Meux & Co.*, who had been in possession of all the title deeds; and that they had parted with the possession of the lease and the assignment only for a

(a) *Buck. B. C.* 525.

particular purpose, and upon an express agreement of redelivery, and under circumstances, therefore, which excluded any presumption of an intention to waive their lien; that the bankrupt had obtained possession by fraud, and that this, therefore, did not come within that class of cases, where parting with the possession had been held a waiver of lien.

1821.

Ex parte

MEUX.

Ex parte

CAWTHORNE.

In the matter

of

FOOT.

The VICE CHANCELLOR.

The retainer by the bankrupt of the lease and assignment, was a fraud upon Messrs. *Meux* and *Co.*; and they are therefore to be considered as equitably in possession of all the deeds. Messrs. *Child* and *Vickers*, claiming only an equity, had no better title than the bankrupt could give them, and were, therefore, to be postponed to Messrs. *Meux* and *Co.*; and *Cawthorne* can be in no other situation. My opinion is, that the finding of the Master is right.

Report confirmed.

LINC. INN, *Ex parte* FIGES.—In the matter of FIGES.
 Sept. 4,
 1821.

Injunction, *ex parte*, to restrain the assignees from selling the bankrupt's effects.

THIS was an *ex parte* application by Mr. Tinney, on behalf of the bankrupt, to restrain the assignees from proceeding to the sale of the bankrupt's effects.

The petition, verified by affidavit, stated, that in June, 1821, a separate commission issued against the petitioner; that under that commission assignees had been chosen, and the petitioner's last examination had been adjourned; that, in July, a joint commission issued against the petitioner and his partner *Longcroft*; and that the same persons had been chosen assignees under the joint commission: that there was partnership property sufficient to pay all the joint debts, and a petition had been presented by *Longcroft* to supersede the joint commission; which petition had not been heard; That, through the friends of the petitioner, one *Henry Hattat* had been induced to advance, and had paid the sum of £900 to the late solicitor of the petitioner, for the purpose of satisfying in full the separate creditors, (except some thereof who were willing that the separate commission should be superseded), and that a petition to supersede the separate commission had been prepared by the said solicitor; that the said solicitor had not applied the said sum in satisfaction of the debts of the separate creditors, or presented the petition; and that, after repeated applications, he had retained £300, part thereof, under a claim of lien, and had

paid the remainder to the petitioner's present solicitor; that the said *Henry Hattat* was willing to advance sufficient to pay the separate creditors in full, and the costs of superseding the separate commission, and the costs and charges incurred in its prosecution; that the separate debts, (excepting those of the said consenting creditors), amounted to £618:2s.; that a sale by auction of the petitioner's property had been advertised by the assignees, for the 5th of September then instant: the petition therefore prayed, that the separate commission might be superseded, and that in the mean time the assignees might be restrained from proceeding in such sale.

1821.

—
Ex parte
Ficks.
In the matter
of
Ficks.

The LORD CHANCELLOR.

Let the assignees be restrained from selling the property until further order: the petitioner undertaking not to remove or dispose of it in the mean time (a).

(a) The petition was not presented at the time of the application, and the order was made for the injunction to issue upon the petition being presented and the affidavit filed. See *ex parte*

Harding, Buck. 24, where the court upon an *ex parte* application in the bankruptcy, granted an injunction to restrain the negotiation of a promissory note.

LINC. INN, *Ex parte* SHAW. — In the matter of HOWARD
 August 30, and GIBBS.
 1821.

Application by the petitioning creditor and provisional assignee, under a subsisting commission against H. and G., to compel the solicitors under a superseded commission against the same parties, to deliver up the proceedings under the superseded commission, refused.

A COMMISSION issued against *Howard* and *Gibbs*, which was superseded, and a new commission issued. This was a petition by the petitioning creditor and provisional assignee under the existing commission, who had been one of the assignees under the superseded commission, to compel the solicitors under the superseded commission to deliver up the proceedings.

Mr. Treslove, for the petition, said, that there were many important documents amongst the proceedings under the superseded commission, of which it was material for those, who had the conduct of the subsisting commission, to be in possession, in order to prevent improper proofs.

Mr. Cullen and *Mr. Montagu*, against it.

The solicitors under the superseded commission have a lien on the proceedings for their costs. A solicitor cannot be divested of his lien, merely upon the plea of convenience. There is no case, where, a commission having been superseded, and a new commission issued, the proceedings under the former commission have been taken out of the hands of the solicitor under that commission, without his bill of costs being paid. It is admitted, that an

attorney has no lien on the proceedings under an existing commission (a), but this is superseded. The court acts with great caution in depriving an attorney of his lien; where the administration of justice requires the production of papers, it may be done, without prejudicing him in that right; *Furlong v. Howard* (b).

1821.
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Ex parte
SHAW.
In the matter
of
HOWARD
and GIBBS.

The LORD CHANCELLOR.

August 31.

I am clearly of opinion, that, upon this petition, which prays, that the solicitors under a late commission against *Edward Howard* and *James Gibbs*, may be ordered to deliver up the proceedings, I can make no order. There are many cases where no lien exists upon proceedings in bankruptcy: for instance, upon the proceedings to the choice of assignees, even the petitioning creditor has no such right to enforce the payment of his expenses, as due to his solicitor; so, where assignees are removed, there is no lien upon the proceedings against the new assignees; but there is no case which determines the question of lien, where solicitors are in possession of proceedings under a superseded commission. These proceedings are a species of record in bankruptcy, which gives the court authority to order them to be deposited in the office of the secretary of bankrupts; and, in very many cases, an order of *supersedeas* has been accompanied with such a direction, but there is no instance of the court having ordered the solicitor to deliver up the proceedings under a super-

(a) *Ex parte Bullen*, 1 Rose, 134. *Ex parte Sandison*, 1 Rose, 275.
(b) 2 Sch. & Lefr. 115.

1821

Ex parte
SHAW.
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of
HOWARD
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seded commission, to the petitioning creditor under a new commission. Whether the assignees might be compelled to deliver them up, I am not called upon to decide on the present petition: but, if an order issued against the assignees, and the solicitor refused to deliver the proceedings, unless his bill of costs were paid, I do not think the court would make any order on the solicitor. If, upon a petition against the assignees, the court would order them to bring in or deliver up the proceedings, and the assignees could not comply with that order but by paying the solicitor's bill, it must be paid.

CASES

IN

BANKRUPTCY.

Ex parte SHAW, PEARSON, and others.—In the **LINC. INN.**
matter of HOWARD and GIBBS. 1821.

THIS petition stated that a commission, bearing date the 22d of August 1821, had issued against *Howard and Gibbs*, upon the petition of the petitioner *Shaw*, under which they had been declared bankrupts: that at one of the public meetings, *George Carroll* offered to prove three bills of exchange for £5,500, £3,750, and £3,957. 11s. 9d., making together £13,207. 11s. 9d.; but that it appearing by the books of account of the said bankrupts that there had been, from September 1816 to the time of the bankruptcy, money dealings between the said *George Carroll* and the bankrupts, in which the said *George Carroll* had taken usurious interest on premiums or loans, and a question having been put to the said *George Carroll*, on behalf of the petitioner *Shaw*, when the account between the said *George Carroll* and the bankrupts was last balanced, the said *George Carroll* refused to answer such question, whereupon the

The court has jurisdiction to remove the persons nominated by the creditors as assignees before the execution of the assignment.

Executor bankrupt cannot, without an order of the court, prove under his own commission, in respect of a debt due from him to the testator's estate.

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Ex parte
SHAW,
PEARSON,
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proof of debt offered by the said *George Carroll* was rejected by the commissioners; and that the said *George Carroll* gave notice that he should apply to the Lord Chancellor to have his proof received: that at one of the public meetings, *Charles Duff* proved a debt of £92. 7s. 5d. on the balance of account between him and the bankrupts, but that the petitioners had since discovered that the said balance was composed of usurious interest on loans of money advanced by him to the bankrupts: that a public meeting was held on the 3d of November 1821 for the choice of assignees, previous to which, a list of three names to be appointed assignees, namely, the said *George Carroll*, *Charles Duff*, and *James Wilkie*, was circulated by the bankrupts: that the petitioner *Shaw*, who had successfully opposed not only the claim of the said *George Carroll* but a certain other claim of £32,828. 18s. 11d. and also several other claims, and the other petitioners and many other creditors of the bankrupts proposed the petitioners *Shaw* and *Pearson*, together with *John Hermon*, to be assignees: that not only very great exertions were made by the said bankrupts in canvassing creditors to vote for *Carroll*, *Duff*, and *Wilkie*, and to induce other creditors to absent themselves to prevent their voting for *Shaw*, *Pearson*, and *Hermon*, but that misrepresentations and threats were used by the bankrupts to many creditors for the said purposes; that in particular, *Howard*, the bankrupt, applied to one *Bridges*, who had proved a debt of £154. 14s. 4d., and solicited him to vote for *Carroll*, *Duff*, and *Wilkie*, as assignees, but that, *Bridges* expressing his determination to vote for *Shaw*, *Pearson*, and *Hermon*, *Howard* declared with an oath, that unless *Bridges* would vote with their party, meaning *Carroll*, *Duff*, and *Wilkie*, he would go to a gentleman, who was one of the best cus-

tomers of *Bridges*, and prevail on him to withdraw his custom from *Bridges*; and that by reason of such threat, or some other threat or undue influence, *Bridges* did not vote for *Shaw*, *Pearson*, and *Hermon*, as he had always declared he intended to do: that at the said public meeting various creditors who had proved debts to the amount of £17,739. 10s. 10d. were admitted to vote for *Carroll*, *Duff*, and *Wilkie*, and various other creditors who had proved debts to the amount of £17,334. 6s. 3d. voted for *Shaw*, *Pearson*, and *Hermon*: that *Brice Pearse* had in person proved a debt of £1,500 on behalf of himself and *John Pearse* his copartner; but that the solicitor for *Carroll* and *Duff* was admitted to vote for *Carroll*, *Duff*, and *Wilkie*, as assignees, by a power of attorney executed by the said *Brice Pearse*, whereby the said *Brice Pearse* authorized that solicitor for him and in his name and stead to vote in the choice of assignees, although the said debt was proved on behalf of the said *Brice Pearse* and *John Pearse* his copartner; notwithstanding that the petitioner *Shaw* objected to the sufficiency of the power of attorney (a): that by reason of such

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(a) The counsel for the petitioners contended that the choice should be set aside on the ground of its having been carried by the vote of this solicitor, in respect of the debt of *Brice Pearse* and his copartner, under this defective power of attorney. *Ex parte Parr*, 1 *Rose*, B. C. 76, was cited in support of the objection, and *ex parte Mitchell*, 14 *Ves.* 597, and *ex parte Hall*, 17 *Ves.* 62, *contra*. At an

early period of the discussion upon the petition, the Vice Chancellor intimated his opinion, that *ex parte Parr* did not reach the present case, as the choice there had been carried by the votes of creditors having no right to vote, whereas in this case the creditor was entitled to vote, but the authority he gave was informal, and that the choice could not be avoided on that ground.

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conduct on the part of the bankrupts, in obtaining *Carroll*, *Duff*, and *Wilkie* to be chosen assignees as aforesaid, the petitioners submitted that such choice ought to be declared null and void, and that *Carroll* and *Duff* ought not to be permitted to be assignees of the bankrupts estate, inasmuch as they would have possession of all the books, accounts, and papers from which the objections to their said respective debts were to be sustained; and that it would be prejudicial to the bankrupts estate that the objections to be made to the debts of *Carroll* and *Duff* should be made and established by themselves; and the petitioners submitted, that the irregularities in the powers of attorney executed by the said *Brice Pearse* and certain other creditors wholly vitiated their votes; and that the petitioners, *Shaw* and *Pearson*, and *John Anthony Hermon*, were duly chosen assignees, and the petition prayed, that (a) it might be so declared, and that the commissioners might be ordered to execute to them a bargain and sale of the real estates, and an assignment of the personal estate of the bankrupt; or that the commissioners might be ordered to proceed to a new choice, and that in the mean time they might be ordered not to execute a bargain and sale or assignment to *Carroll*, *Duff*, and *Wilkie*.

Upon this petition being presented, and before the execution of the assignment to *Carroll*, *Duff*, and *Wilkie*, an *ex parte* application was made by the petitioners to His Honour the Vice Chancellor to stay the execution of the assignment by the commissioners, and by the direction of the Vice Chancellor, it was notified to the

(a) The prayer that *Shaw*, was abandoned by the counsel *Pearson*, and *Hermon* might be for the petitioners. declared duly chosen assignees,

commissioners that the assignment should not be executed until the petition had been heard.

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The affidavits in support of the petition stated, upon belief, the circumstances of *Carroll's* and *Duff's* debt, as mentioned in the petition; that *Carroll* and *Duff*, and the bankrupts had been engaged for some time prior to the choice in soliciting and procuring persons to vote for *Carroll*, *Duff*, and *Wilkie*, as assignees; that great exertions had been made by the bankrupts, not only in soliciting numerous creditors to vote for *Carroll*, *Duff*, and *Wilkie*, and to induce other creditors to absent themselves, to prevent their voting for *Shaw* and the other persons proposed to act with him, but that threats and other improper influence had been used by the bankrupts for such purposes; that by such means many creditors were induced to vote for *Carroll*, *Duff*, and *Wilkie*, and that others were kept away from the meeting for the choice; and that if there was another choice the result would be different. These affidavits supported, upon the information of *Bridges*, the allegation concerning him in the petition, and stated, that *Shaw*, from an interview which he had since had with *Bridges*, believed that *Bridges* was induced to absent himself from the said meeting in consequence of the threat or influence of the bankrupt *Howard*; and that *Bridges* refused to make an affidavit, unless by the direction of the Lord Chancellor or the commissioners; and, upon information and belief, that *Gibbs* solicited various other creditors to vote for *Carroll*, *Duff*, and *Wilkie*, or absent themselves. By the affidavits of *Herbert* and *Tewart*, two creditors, it appeared that they had been pressed by the bankrupts to vote for *Carroll*, *Duff*, and *Wilkie*, or not to vote at all; and that *Tewart* did not vote.

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The affidavits in answer negated the allegations of usury, and stated, the circumstances under which *Carroll's* debt from the bankrupts arose; that the debt, though opposed, had been admitted under the former commission; that the former commission had been superseded at the instance of *Carroll, Duff and Shaw*, the assignees under that commission; that *Carroll and Duff* were not put in nomination as assignees by the bankrupts; that they, having been assignees under the former commission, had determined to put themselves in nomination; and in August 1821 applied to *Wilkie*, who had proved a debt of £2,779. 7s., to join them as assignees, and he consented so to do; that their nomination as assignees was made without any concert with the bankrupts; that the bankrupt *Howard* expressed to *Bridges* a wish that he would not vote for *Shaw* and the persons nominated by him to be assignees, and told *Bridges*, that he, *Howard*, should endeavour to get a friend of his, who was well known to *Bridges*, to write to him, *Bridges*, on the subject; that no oath or threat was used to *Bridges*; that the bankrupts conceived, not only that they were justified in using, but that the duty they owed, as well to their creditors as themselves and their families, called on them to use every fair and honest means to get proper persons appointed assignees; that *Gibbs* had applied to *Herbert*, a creditor, to vote for *Carroll, Duff*, and *Wilkie*; that *Bridges*, though pressed by *Shaw* to make an affidavit in support of the allegation in the petition, had refused so to do. (a)

(a) Great part of the affidavits of *Shaw*, which it is not necessary to state.

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Mr. *Horne*, Mr. *Treslove*, and Mr. *Blake*, for the petition. (a)

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Mr. *Hart*, Mr. *Bell*, Mr. *Heald*, and Mr. *Montagu*, for *Carroll*, *Duff*, and *Wilkie*.

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Mr. *Wetherell* and Mr. *Agar* for the bankrupts.

The VICE CHANCELLOR.

On the 3d of November last, a meeting was duly appointed under this commission, for the choice of assignees; and at that meeting *George Carroll*, *Charles Duff*, and *James Wilkie* were elected for that office by the major part in value of the creditors, who thought fit to vote upon that occasion. The law provides that the commissioners shall assign the bankrupt's estate to the persons so chosen, and it is usual, though not absolutely necessary, for the commissioners to execute that assignment at the same meeting. In this case, the choice of assignees having occupied a great portion of time, the assignment happened not to be ready for the signature of the commissioners, and for that reason alone the commissioners then postponed the execution of the assignment. The choice of assignees had been warmly contested between the successful parties, and *Benjamin Shaw*, *Henry Pearson*, and *John Anthony Hermon*; and Mr. *Shaw* and Mr. *Pearson*, taking advantage of this delay in the execution of the assignment, presented a petition to the Lord Chancellor, praying that the commissioners might be ordered not to execute the assign-

Dec. 4,
1821.

(a) The argument is omitted as the principal points were embraced in the discussion upon the appeal.

1821. ment to the three persons who had the majority of votes, but that it might be declared, that *Benjamin Shaw, Henry Pearson, and John Anthony Hermon* were duly chosen assignees, and that the commissioners might be ordered to execute the assignment to them.

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The Lord Chancellor was pleased to refer this petition to me; and, there being no precedent to be found that the great seal had ever interfered to prevent the execution of the assignment by the commissioners, and the course having always been, where the choice was complained of, to apply, after the assignment was executed, to remove the persons chosen, I appointed an early day for the discussion of this preliminary question, whether there were such special circumstances in this case, as made it fit, for the protection of this estate, that the Court should, before the assignment was actually made, enter into the consideration of the validity of the choice of the assignees. Upon the discussion of that question I came to the conclusion, that, in this case, it would be for the advantage of this estate, rather that it should remain for a few days longer without the protection of assignees, than that the persons chosen should assume the duties of their office, subject to the future enquiry, whether they ought not to be removed.

The discussion of that day has been renewed upon the present occasion, and it has even been argued, that the great seal has no authority to suspend the execution of the assignment. The authority of the great seal to controul the conduct of the commissioners in matters where the legislature has fixed no certain time for acts to be done admits of no serious question: I agree that such authority ought to be most sparingly exercised.

It is true there is no precedent produced of its being exercised before in a case like the present; neither was there any precedent of suspending the advertisement of bankruptcy in the Gazette until a very late period.

I do not again enter into the question of the expediency of suspending the assignment in the present case, because, the suspension having taken place, and the parties having fully discussed the merits of the choice, it would be an absurd waste of time and expence now to postpone the decision.

It was my purpose, when I first decided this preliminary question, to have entered immediately into the general merits of the petition; but the anxiety of the parties having continued to load this subject from day to day with additional affidavits, the actual hearing of the petition did not take place until Thursday last. On the hearing of the petition the petitioners did not insist that Mr. *Skaw* and his friends ought to be considered as having been duly chosen, but confined themselves to that part of their petition, which impeached the choice of Mr. *Carroll*, Mr. *Duff*, and Mr. *Wilkie*. The important objections, on the part of the petitioners, to the election of those gentlemen, were, first, That it had been procured by the canvass and solicitation of the bankrupts, and by threats and misrepresentation on their part; and, secondly, That Mr. *Carroll*, claiming to prove a debt which had been rejected by the commissioners, had an interest opposed to that of the general body of the creditors, and that it was inconsistent that he should be one of the assignees, upon whom the law imposed the duty of protecting the general interest of the creditors.

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I think it not necessary to enter into any detail of the facts disclosed in these voluminous affidavits. It may be stated, that it is denied by the bankrupts that they used any threats or misrepresentations to influence the choice of assignees; but they do not deny the general canvas and solicitation charged upon them, or that that canvas and solicitation did in fact procure the election of Mr. Carroll and his friends, and they both avow, in the same words, that they conceived themselves not only justified in using, but that it was their duty, as well to their creditors as to themselves and their families, to use every fair and honest endeavour to get proper persons appointed assignees under their commission. The petitioners allege, that they believe that the object of the bankrupts, in procuring assignees of their own choice, was to prevent that full and fair investigation of their accounts and transactions which the interests of the creditors require. The bankrupts allege, on the other hand, that, believing there will be a considerable surplus of their estate after payment of all their creditors, if the same is properly and honestly administered, their interference proceeded from no other motive than to secure a prudent and honest administration. I am not called upon to decide between these opposite statements. The question for me to determine is, whether, without enquiry into the motive, it is consistent with the spirit and policy of the bankrupt laws, that bankrupts shall be permitted indirectly to choose their own assignees.

By the 34th and 35th Hen. 8th, which was the first law concerning bankrupts, the bankrupt's estate was administered under the immediate direction of the Lord Chancellor, and certain other great officers. The increase of commerce made new regulations necessary, and the 13th Eliz. gave authority to the great seal to

appoint commissioners for the administration of the bankrupt's estate. The power to constitute general assignees was not given to the commissioners until the 5th Geo. 2d., and they are there directed to assign the bankrupt's estate to such person or persons as shall be chosen for that purpose by the major part in value of the creditors. In all these statutes, not only is there no provision for the interference of a bankrupt in the administration of his estate, by reason that he has an interest in a possible surplus; but it is vested exclusively and entirely in other hands; and no person can read these statutes without seeing the principle upon which they proceed. Those who were successively intrusted with the administration of bankrupt's estates had not only those general duties which belonged to them as trustees for the creditors, but were specially required strictly to examine the bankrupts and all other persons with whom they might have had dealing; first, for the purpose of ascertaining that they had themselves concealed no part of their property; and next, for the purpose of discovering whether, where they had parted with their property to others, it had been under such circumstances as would enable such other persons to maintain the possession of it, to the prejudice of the general creditors. For such purposes, the administration of the bankrupt's estate was necessarily placed in hands altogether out of their reach and influence: and when it is stated that all these duties have now devolved upon the assignees under the statute of the 5th of Geo. 2d., the conclusion follows, that it is against the first principles and the whole policy of the bankrupt laws to permit bankrupts indirectly to choose their own assignees.

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It is said, that if this principle be adopted upon the present occasion, it will be for the first time since the

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bankrupt laws have been framed. I am not aware that a case like the present was ever before brought for judicial decision. I am not able to determine that a case like the present ever did in fact occur, where the evil complained of existed to the same extent: but, if the principle be clear, the novelty of the case forms no objection. In argument, many ingenious and very special cases have been put, to shew, that there may be circumstances which would fully justify a bankrupt in influencing the choice of his assignees. There may be exceptions to every general principle," and, when such exceptions occur, they will remain to be considered upon their own merits: it is enough to say, that this is not a case of such exception.

It is asked where, upon this principle, is the line to be drawn? Is a choice to be avoided, by the application of the bankrupt to one or two friends, whose votes being given at his request, may or may not turn the election? At present, I have only to say that such is not this case. This is not denied to be a case of general canvas, nor is it denied that the choice was actually procured by the bankrupts.

Being of opinion, therefore, that this is a choice which cannot, for the reasons stated, be permitted to prevail with safety to the general interest of creditors under the bankrupt laws, it is unnecessary for me to enter fully into the second point of objection here, namely, the considerations which arise out of *Mr. Carroll's* situation.

Whether *Mr. Carroll* has such an interest, in opposition to the general body of creditors, as ought, wholly or partially, to exclude him from the office of assignee, and whether the mere exclusion of *Mr. Carroll* would

necessarily avoid the choice of the two other assignees, being questions which involve very important general principles, and not material to the result of this petition, I must decline for the present to express any opinion upon them.

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There may be behind another question, very material for the consideration of the parties, I mean the question, whether *Mr. Carroll*, *Mr. Duff*, and *Mr. Wilkie* will be eligible to the office of assignees upon a new choice. I can now express no opinion upon it, because no declaration of such an opinion is prayed in the petition, nor has been asked at the bar, and *Mr. Shaw*, in his affidavit, swears that a majority of the creditors are now of opinion, that these gentlemen ought not to be assignees, and, if that be accurate, such a declaration is unnecessary. Yet still it may be prudent for those three gentlemen to be well advised, whether, as their present election is avoided, upon the ground of its being induced by the influence of the bankrupts, it may not be alleged, if they happen to be re-elected, that it is, in some degree, the result of the former influence, and open, therefore, to the former objection.

Against this judgment *Carroll*, *Duff*, and *Wilkie* appealed, on the ground that there was no objection in law to the proper interference of the bankrupts to procure proper assignees, and that the election of the appellants was not produced by the interference of the bankrupts.

Upon the suggestion of the Lord Chancellor, an allegation was introduced by amendment into the original petition, stating that the bankrupt *Howard* had been admitted to prove a debt of £963. 10s. due from the

1821. bankrupts to him, as executor of one *John Campa*, without an order of the court; and upon that proof, which was sufficient to turn the choice, had voted for *Carroll*, *Duff*, and *Wilkie*; in order that the right of the bankrupt *Howard*, as such executor, to prove and vote for the assignees under his own commission, without an order, might be discussed.

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Mr. *Wetherell* and Mr. *Agar* for the bankrupts.

The court has no jurisdiction to interfere between the choice and execution of the assignment. By the 5th G. 2. c. 30. s. 26., it is imperative on the commissioners immediately to execute the assignment to the persons elected, *ex parte Simpson*, 1 *Atk.* 68; *ex parte Greignier*, 1 *Atk.* 91; and the power of vacating is given in express terms by the 31st section of that statute, but not till after assignment. Neither the commissioners nor the Lord Chancellor have any discretion as to the persons to be appointed assignees; and as an express power is given to vacate assignments, no power can be implied in cases not within that express provision. The instance stated, of the suspension of the advertisement in the *Gazette*, as in *ex parte Forster (a)*, is not applicable: in that case there was no act of bankruptcy on the proceedings, and consequently no legal adjudication of bankruptcy, and the application was after, and not to prevent the adjudication, which the Court has refused to do. (b)

(a) 1 *Rose*, 49.

405.; *ex parte Fletcher*, 1 *Rose*,

(b) See *ex parte Stokes*, 7 *Ves.* 337, 1 *V. & B.* 350.

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Notwithstanding the language of the 26th section, it is the constant practice for the Court to postpone the choice, and to appoint a new time and place for that purpose; and after the election, in case of the persons elected not being present, or afterwards refusing to accept the trust, the commissioners adjourn the meeting. There are many decisions of my predecessors which I cannot understand, unless they assumed to themselves powers not expressly given by any act of parliament. Suppose a choice effected by persons, nine-tenths of whose debts were fictitious, and the fact appeared upon their own declaration between the choice and the execution of the assignment; must the Court, nevertheless, wait till the assignment is executed, which must certainly be set aside?

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The 26th section directs the commissioners forthwith to appoint a time and place for the choice, not forthwith to proceed to the choice (a). A power of adjournment is incident to the Court of the commissioners, as it is to every Court; and where the persons elected are not present to take the trust, or afterwards refuse to accept it, there is, in fact, no election. The Court never appoints the original time and place for the meeting, which the commissioners are by the 26th section expressly directed to do, but only interferes to postpone a meeting appointed by the commissioners, in pursuance of such direction. A power has undoubtedly been assumed by this Court in cases not expressly provided for by the statutes; but here is an

(a) *Ex parte Garland*, 1 *Mad.* 318, 2 *Rose*, 361; *ex parte Grindley*, 1 *Atkins*, 91.

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express statutory provision adequate to the case, though not extending to this premature application. The power to vacate the bargain and sale under the 31st section of 5 Geo. 2. applying only to the bargain and sale made to the persons chosen by the creditors, the Court has no jurisdiction to vacate a provisional bargain and sale, *ex parte Carter*, 5 *Mad.* 81. There is a wide difference between the general jurisdiction of this court in equity, and its jurisdiction in bankruptcy, in which it is limited by the statutes. If the Lord Chancellor exercised a general equitable jurisdiction in bankruptcy, he would not have denied his jurisdiction in *ex parte Tupper*, 1 *Rose*, 179. In *ex parte Lund*, 6 *Ves.* 781., the distinction of the jurisdictions was fully discussed. The general power of the first statute operates where not limited by the subsequent statutes: as the 13th Eliz. empowers the commissioners to sell the bankrupt's estate, and *pro tanto* restricts the general authority of the Court: so the power given by 5 Geo. 2., which provides for the choice of assignees and the vacating of assignments, restrains the Court from interfering otherwise than is there provided. The persons chosen are by the election invested with the character of trustees: the form of the assignment, a ministerial act of the commissioners, is alone wanting to give them the legal power of dealing with the property. This is the first application to interfere before the execution of the assignment, before the violence of the contest for the election of assignees has subsided. The creditors are the best judges of the fitness of the persons to whom their interests are to be confided; but if this be established as a precedent, the commissioners will exercise a conditional veto upon the choice, until the Lord Chancellor's will shall be known: the estate will in the mean time remain unprotected; and the next en-

croachment upon the privileges of the creditors will be a petition, before the nomination, to prevent A. or B. from being nominated.

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It is admitted that there has been solicitation by the bankrupts, but there is no evidence that the choice was procured by their solicitation. It is the duty of a bankrupt to interfere to protect himself or his estate: The court not only sanctions his interference, but punishes him for default of interference, as if he acquiesce in improper proofs, by refusing his certificate. It is true the statutes have not directed the interference of the bankrupt, but statutes are merely prohibitory, and there is no restraint upon his interference. The bankrupt has a main interest in the administration of his own estate; an interest which the law recognizes when it prohibits him from being a witness in matters relating to it. He may petition to expunge debts, *Ex parte Coles* (a). In *Kensington's* bankruptcy, Mr. *Kensington* himself acted for the assignees with a salary. In *Like v. Howe* (b), it appeared that the bankrupt had interfered in the choice of assignees; yet Chief Justice *Mansfield* does not treat it as illegal. If a bankrupt may not interfere to procure the choice of proper persons as assignees, he cannot interfere to prevent the election of improper persons, or if some interference be permitted, where is the line to be drawn. In *Bryant's* case (c) the bankrupt petitioned to remove his assignee;

(a) *Buck*, 242.

(b) 6 *Esp.* 20.

(c) This petition of the bankrupt prayed that the debt of the assignee might be expunged, and

that he might be removed from being assignee on account of his having been unfairly elected and misconduct, or if he was to be continued, that he might give secu-

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In *ex parte Jackson, G. Cooper 286 (a)*, the object of the bankrupt's petition was to vacate the choice; and though a creditor joined in the petition, it was merely as a security for the costs. It must be admitted that a bankrupt may, immediately after the election of assignees, petition to vacate the choice, on disclosure of its being carried by fictitious debts, and may he not interfere to prevent an evil which he may so seek to remedy afterwards? The bankrupt is as much a cestuique trust as any of his creditors; if he may not interfere, has the petitioning creditor any such right? If influence is to avoid the choice, the honest bankrupt will be in the worse situation, as his solicitation will be more influential. A bankrupt may canvas for his certificate, by showing that he has made a full discovery. Mere solicitation, by analogy to other cases

rity not to commit any waste of the petitioner's property: the petition was dismissed, and the costs of the assignee ordered to be paid out of the estate. Nov. 16, 1815.

(a) The first petition was by the bankrupt *Jackson*, in February 1814, and prayed the removal of the assignees, and a new choice; and on that petition it was ordered that the commissioners should call a meeting of the creditors by advertisement, in the usual manner, in order that the creditors who should be present might, if they thought fit, determine to proceed to a choice of new assignees, in the place of the then assignees; and if at such meeting the creditors

should determine to proceed to a new choice, it was ordered that they should proceed to such new choice accordingly. The creditors proceeded to a new choice, and the bankrupt was chosen sole assignee; upon which the petition reported in *G. Cooper, 286*, was presented. No creditors joined with the bankrupt in the petitions, but they both purported to be on behalf of himself, the bankrupt, and several of his creditors, and several creditors presented petitions, stating, that they would have joined had they thought it necessary, and praying that the prayer of the bankrupt's petitions might be granted.

of election, does not vitiate a vote, unless an improper motive be apparent. Supposing that there has been improper interference by the bankrupts, are the persons chosen to be displaced, though it does not appear that any one creditor voted under the influence of the bankrupts. How is the Court to scrutinize the effect of this interference upon the minds of the creditors, or to ascertain how far the characters of the persons nominated came in aid of the influence of the bankrupts. This is in fact an application to cancel the votes of the majority of the creditors, without any proof of the misuse of their franchise. If creditors are influenced, how are they to be purged of that influence for a future choice; or are they to be disfranchised.

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As to *Howard's* proof—bankruptcy does not destroy the legal character of an executor, or deprive him of his rights and remedies as such. *Cooke, B. L. 152*: The parties interested in the fund are entitled to influence the choice of assignees and the certificate through the executor. The Court will not, upon the principle of *De Tastet's* case (a), anticipate that *Howard* will abuse his right. The law will not attribute civil incompetency, except for felony. It is better to leave the legal right to be affected by subsequent misuser, than to say, *a priori*, he shall not vote.

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Suppose A. trustee for B. only, and they go together to prove, which is to prove? Or, suppose a bill

(a) 1 *Rose*, 527.

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filed against an executor before his bankruptcy, and a receiver appointed, who would prove?

Argument continued.

The receiver would be restrained. Cases may be put in which a bankrupt executor would govern his own certificate; but this Court has power to meet and remedy the evil when it arises, without overturning long established practice, to obviate the possibility of evil. Applications as to trustees or executors may be considered with reference to voting in the choice of assignees, signing the certificate, or securing the funds. No instance of interference by the Court as to the two first rights; but only as to the dividends. It is contrary to the spirit of the bankrupt law to expose the certificate to the mercy of a person not being a creditor, nominated by the Court for that purpose, or to the vindictiveness of twenty legatees, who know only the bad part of the bankrupt's character; or if no person is to sign in respect of such a debt, it may be impossible for the bankrupt ever to obtain his certificate. Express words are necessary to take away a right. One great object of the bankrupt laws, to give bankrupt an interest in his affairs. Long established practice to admit bankrupt executor, not to be hastily varied; no legislative prohibition of bankrupt from voting. In *Cowper's* case, decided only five years after the 5 G. 2. c. 30., *Green's Bankrupt Laws*, 260, a book that used to be frequently quoted as authority in bankruptcy, Lord *Hardwicke* dismissed a petition to remove the bankrupt, who was his own sole assignee, and to stay his certificate, where the bankrupt, as executor of his creditor, had chosen himself assignee, and carried his certificate, on the ground that the Court

would not take away a legal right, and that his rights as executor and as bankrupt must be considered as centering in separate individuals. In *ex parte Ellis*, 1 *Atk.* 101, though Lord *Hardwicke*, at the instance of the creditors of a testator, some of whose assets had been received by the bankrupt as executor, interfered to secure the dividends, he at the same time admitted the legal right of the bankrupt. In *ex parte Leake*, 2 *Bro. C.C.* 596, Lord *Thurlow* states and acts upon the right of bankrupt executor to prove, but provides for the security of the dividends. *Ex parte Shakeshaft*, 3 *B. C. C.* 197, *ex parte Llewellyn*, *Cooke's B. L.* 153, *ex parte Brooks*, *Cooke's B. L.* 155, *ex parte Moody*, 2 *Rose*, 413, were applications by cestuique trusts who clearly cannot prove without an order, and for the protection of the fund. If he retains his legal right to prove, no previous order necessary. The instances of orders for receivers will not warrant an order to restrain bankrupt from voting.

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Mr. *Horne*, Mr. *Treslove*, and Mr. *Blake*, for the respondents.

As to the jurisdiction:—The Lord Chancellor's power is not derived from any single clause of the statutes, but from the spirit of the statutes collectively, which give him every power necessary to any emergency that may arise in the just administration of the bankrupt's affairs. Many orders in bankruptcy not authorised by the letter of the statutes, such as to suspend the advertisement, postpone the choice. In *ex parte Garland*, 2 *Rose* 362, it was not denied that commissioners might delay the execution of the assignment: It is common practice to

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execute an assignment of the personal estate, but delay the execution of the bargain and sale; and petitions have been presented to remove assignees in the interval before the execution of the bargain and sale. The power given to the Lord Chancellor by the old statutes is not taken away by the modern statutes, unless where expressly excluded; a clear general power under the old statutes, unless where taken away by 5 Geo. 2. The directions of the 5 Geo. 2. to assign are mere formal words; not exclusive of the jurisdiction of the Lord Chancellor. The 31st section of 5 Geo. 2. refers only to cases where the assignment is actually executed; here there is no assignment, and nothing therefore to interfere with the general jurisdiction of the Lord Chancellor; that section gives power to vacate assignments, but there have been orders for the choice of new assignees not proceeding on that section. Legislation was necessary to vacate the bargain and sale. If the nominees of the creditors became bankrupt before assignment, must the commissioners assign?

As to the interference of bankrupt:—It is not the fact of canvass merely on which we rely, but the degree and mode of interference. The innocence of improper motive on the part of the creditors does not lessen the misconduct of the bankrupts, whose tools they are, in the accomplishment of objects not to be sanctioned. If bankrupts conspire to procure the choice of certain assignees, and they are chosen, it is the bankrupt's commission; the Court on policy sets aside a commission having every legal requisite but being what is called the bankrupt's commission, without any statutory authority for so doing. The bankrupts have been treated throughout as if they

were tenants in common with the creditors, but they have nothing to do with the property till the creditors are paid, and then they have a right to an account and nothing more. No inference can be drawn from *Jackson's* case, where creditors joined the bankrupt in the petition. *De Tastet's* case is not the case of a bankrupt, but of a creditor who meant to vote for himself, which he was entitled to do. *Ex parte Harrison, Buck*, 246. The commission proceeds upon the principle that the bankrupt has no right to manage his property any longer, and such is the language of the statutes. Here general canvass admitted. *Carroll* too has an adverse interest: If *Carroll* is removed, the others cannot remain: the duty of assignees is altogether adverse to the bankrupt, so far as in some cases of concealment to throw a duty on the assignees of proceeding criminally against him, the execution of which duty cannot be expected from assignees chosen by his influence.

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As to *Howard's* proof:—The bankrupt can never be a creditor within the meaning of 5 Geo. 2.; that statute, as appears by its title and recital, was meant to prevent frauds by bankrupts, and gives to the creditors the adverse management of their property, and a controul over the bankrupts themselves: Can it be said that, because a bankrupt executor has committed a *devastavit*, has committed fraud, he is to be invested with the rights of a creditor within that statute, and to have the benefit of his breach of trust to protect himself against the very persons he has defrauded; so the greater his fraud, the greater his immunity. If applied to one case it must extend to all; to executor *durante absentia*, *durante minoritate*, executor *de son tort*. In *Comyn's Digest*, title Bankrupt, 102, it is said, that

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if executor bankrupt, legatee shall be a creditor. The case in *Green* does not apply; for there, the father, the creditor, was living at the time of the son's commission, and proved under it; and, looking to the hesitating language of Lord *Hardwicke* in *ex parte Ellis*, "in strictness," &c., the reasoning attributed to Lord *Hardwicke* in *Green* cannot be correctly stated. In *ex parte Ellis*, where there was no *devastavit*, the property remaining in specie, a receiver was appointed. *Ex parte Leake*, where *ex parte Ellis* is referred to, is decisive against such proof without an order. There Lord *Thurlow* gave his judicial opinion what is to be done under an order, and ordered the bankrupt to be admitted a creditor; but the right of proof without an order was not glanced at. *Ex parte Shakeshaft* was a case of *devastavit*, and it does not seem to have entered the mind of the Lord Chancellor that there could be proof without an order. In *ex parte Moody*, in which the tenant for life, who was admitted to prove, was parent of five of the nine infant children entitled to the fund in remainder, the parent of the other four was in collusion with the bankrupt. Executor cannot bring action or suit against himself; cannot be both debtor and creditor. When the Court has admitted a bankrupt executor to prove, it has been under such restrictions and directions as were applicable to the case. It is only where the case is clear that it deals with it by an order in bankruptcy; if complicated, it puts the party to a bill, and the trustee guilty of the breach of trust cannot file the bill. In the cases adduced on the other side, not always the executor who was admitted to prove, but where justice required, some other person ordered to prove, which shews there is no common law or statute right. It is admitted that a receiver must

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be appointed, but that cannot be done without an order: and who is to apply for that order? This implies that the bankrupt must come to the Court in the first instance.

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Where a receiver is appointed, he cannot vote in the choice of assignees; and I doubt whether he could sign the certificate: but he might petition to stay the certificate. (a)

Person appointed by the court to prove and receive dividends, cannot vote in the choice of assignees.—
Whether he can sign the certificate.—Quære.

Argument resumed.

As *creditor* is the only word used in the statute, if a bankrupt executor can prove, may he not be petitioning creditor? *Ex parte Shakeshaft* shews that we are supporting, not opposing, the settled practice. Upon a fraudulent sale of stock by trustees or executors, who is to decide what is to be proved, the value at the price of the stock when sold, or when the proof is made? In many other cases that may be put of greater complication, not the bankrupt, but the Court must regulate the proof by an order adapted to the circumstances of each case.

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(After stating the petition). This petition came on before the Vice Chancellor, and His Honor, according to the note given me of his judgment, held the choice to be bad, upon the ground that there was such a degree of solicitation and canvass on the part of the bankrupts, as he thought himself authorised to say made the

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(a) *Es parte Evans*, 1 Montagu B. L. 332.

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assignees the choice of the bankrupts themselves, and not of the creditors; and he laid out of his consideration the other points, such as the circumstance of *Carroll* not submitting to be examined, or having an adverse interest. I accede certainly to this, that it is a legal difficulty for any man to say what is the species of interposition that is fair, reasonable, and proper; and I make that observation because, in the affidavits and all the papers before me, wherever fair, reasonable, and proper interposition is mentioned, there is no explanation whatever given of what was the nature of the interposition that was actually made. In that view of the case I should have found it extremely difficult myself to be so perfectly satisfied of that ground as to dismiss the other considerations to which the petition led. It happened, I believe, that the discussion before the Vice Chancellor concluded without his being apprised of the fact that in one respect these gentlemen were chosen substantially by *Howard*, as it appears that *Howard* proved a debt of £960, which turned the choice — a circumstance material, for this reason, that if *Howard* had no right to vote without an order, the fact of his voting cannot be laid out of the consideration when you attend to the circumstances about canvassing, as a stronger recommendation could not be given; if, on the other hand, he had a right to prove without an order, and proving, to vote in the choice of assignees, and sign his own certificate, if that be the general law, it calls much into question the application of the supposed policy of the law, as prohibiting any interference by him in his affairs. Then is he in that manner to appoint his assignees? Is he to put the administration of his estate into the hands of the very persons for whom he votes? In that way he may discharge himself from all the debts he owes in the world; that is a material circumstance

for the consideration of the Court in this case, connected as it is with the other circumstances detailed in the evidence. The Vice Chancellor determines also, that the great seal had authority to interpose before the assignment was made. Now I cannot help thinking, upon turning in my mind what this Court has done in the execution of the bankrupt laws; that there are a great many things done by this Court in pursuance of an implied authority, which are much stronger than that of determining the circumstances attending the choice of assignees previous to the assignment being executed, and I cannot, therefore, give weight to that objection.

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The next question is, whether there has been such an interposition on the part of the bankrupts as to render null and void the choice of the assignees. With respect to that question, I have had great difficulty in my own mind to determine what is the degree of interposition on the part of a bankrupt which would make a choice null and void, and to define with sufficient precision what is the nature and amount of proof which should justify the Court in declaring the choice to be the effect of the bankrupt's advice and solicitation: in the nature of some cases, advice and solicitation may be very well characterised as not being undue. Another great embarrassment which has occurred in the consideration of it is, that I am here not to determine the question between these petitioners and the bankrupts only, but every creditor who has a vote has an interest in supporting his choice; and consider the immense difficulty of trying the question of what really did influence each of the creditors in their choice. Am I to destroy the choice of the creditors without an opportunity being given to them to explain what really did influence their choice? I am ready to agree that if you can make out that the choice

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has been effected by the improper interposition of the bankrupts, the assignees shall be denied the character of assignees; but, on the other hand, when it is laid down as a principle, I must have the testimony which establishes the fact that the case before me is within the application of that principle. To illustrate this here are creditors who have been applied to by the bankrupts, is it the necessary effect, that they are to vote under the influence of that application; some creditors who have been applied to by the bankrupts were clearly not influenced by those applications, as they actually voted the other way. Again, suppose a man becomes a bankrupt by the fraud or fault of others, without any blame or stain upon his character: though, according to the former statutes, all bankrupts were fraudulent persons, it will be agreed that latterly the law has acknowledged that many men become bankrupts without that misfortune being occasioned by their own fault: I am very ready to admit, that as to a person of that character, the law must deal with him as with all other persons; but before you adopt a rule prejudicial to character, which the law will call upon you to apply generally, is it quite clear that it is a wholesome principle, which intends that the person who has the most accurate knowledge of the state of his affairs, how he became a bankrupt, by what means his fortune may be retrievable, and by what method his estate may be best collected for the benefit of his creditors (even without yielding him any surplus, or doing so) must shut his mouth, or that he is to say, I cannot advise any of you to choose the person who I think would be the best assignee, and yet the person he would recommend might be the only proper person to administer his affairs. It may be said that those are cases of exception; that may be so when you get at the general rule; and it results there-

fore to this : taking all the circumstances of this case together, is the Court satisfied that there has been here improper interposition on the part of the bankrupt? That question raises a number of difficulties: is the Court as sure as it ought judicially to be of the motives which induced the creditors to vote? Have they voted as creatures of the bankrupt, or using their best judgment; that judgment being formed by the communication of the bankrupt and of other persons, as well as by their own researches into his affairs. It is on account of those difficulties, that I confess I cannot lay out of my consideration the situation of *Carroll* in this business. *Carroll* is chosen along with two other persons as assignees, and I observe, that the Vice Chancellor in his judgment reserves his opinion upon this point, whether, if the Court thought that it should exercise that implied authority (at least not taken out of it by any statute, although not given to it expressly by any statute), and the choice of *Carroll* were not good, the choice of *Duff* and *Wilkie* could stand? Now, speaking the language of experience, and looking to the opinions of others whom I am bound to respect, I have no doubt that if *Carroll* be not well chosen, neither *Duff* nor *Wilkie* is well chosen; if the creditors vote for three persons to manage the affairs of the bankrupts, they thereby express their opinion that the affairs of the bankrupts should be committed to the three, and I cannot collect that they should be committed to two of the three, if one of them be rejected. I may suppose that it might be said by a creditor, "I will vote for all the three; but if you take *Carroll's* experience away from them, I will not vote for the other two without him." These points bring on another consideration; that in the course of the two or three last years, there has been an intimation of a prevailing opinion, that if a commission be taken out under such circum-

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Where, upon a joint choice of three persons as assignees, the Court rejects the nomination of one of them, it will set aside the choice altogether, as it cannot collect from the nomination of three persons jointly an intention to entrust the administration to two of the three if one be rejected.

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stances, as to occasion its being called the bankrupt's commission, yet if it appear that the bankrupt's affairs be entrusted to assignees not the choice of the bankrupt, the commission ought not to be superseded. I may be misled by the notions I collected in this Court many years ago, when I say I believe that the doctrine as to the bankrupt's commission was a doctrine founded upon its being supposed to be the very best evidence, that whoever were assignees were really the bankrupt's managers of his property, and that he who contrived and managed such commission always did so in order to get a large influence in the administration of the estate. It is not to be overlooked, that though in this case it was not a concerted commission originally, and I superseded the former commission upon the ground that there was no petitioning creditor's debt, yet the circumstances of that commission bear strongly upon this: and it is not an immaterial circumstance arising out of that former commission, that *Wilkie*, one of *Carroll's* present co-assignees, voted and petitioned against the choice of *Carroll* under that commission, but is now joined with those against whom he formerly so voted and petitioned.

Assignees owe a duty to every creditor, and each creditor owes a duty to the other creditors. With respect also to the solicitors under the commission, I can only say, that it sometimes happens that the best men are employed for parties having adverse interests, yet I cannot permit my observations to be closed, without saying that it is the duty of the solicitor employed by the bankrupt, if he find that he is employed by the assignees, to see that he can do his duty to every creditor, as well as to the bankrupt. If he is the agent of all, he must do his duty to each and all of them, however difficult it may be to discharge that

duty. I must say, that I never saw proceedings in any bankruptcy in which there was a necessity for the interference of the Court more imperious than in this; for whether *Carroll* can or cannot prove the rest of his debt (and it would be improper in me to express an opinion upon that part of the subject, even if I had formed an opinion upon the merits of it), yet I cannot read the proceedings without observing, that the case calls for much adverse examination. I take into consideration all the other circumstances that have occurred, and without saying whether if I were bound to decide this question merely upon the interposition of the bankrupt, I could get satisfactorily to the conclusion what were the motives which induced the nomination of these parties, after a laborious research into the evidence, I have no difficulty in stating, that, taking the case altogether, if the nomination had been carried into execution by assignment, I should have been of opinion that *Carroll* stands under circumstances in which he should not be assignee. This is not a case in which it is to be considered whether another assignee, or another person, should be appointed to examine his debt, as in *De Tastet's* case; for the question as to *Carroll's* debt is one which ought to be agitated with him, not as assignee, but by the application of the jealousy of persons armed with the powers of assignees. In *De Tastet's* case, it was a single debt that was to be examined, and that examination would answer all the ends of justice; but no one can look to this bankruptcy without seeing, that if justice be to be done, it must be strictly and accurately examined into; and if that necessity arise from circumstances in regard to other creditors not unlike the circumstances in the case of *Carroll*, the question of his being assignee amounts to something higher than the examination of his debt alone. I am, therefore, of

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opinion, upon all grounds, that this choice ought not to stand. (a)

(a) Upon the search made in the bankrupt office for instances of the interference of bankrupts in the administration of the commission, the following cases were found: *Ex parte Hedges*, and others, *re Hedges*: Petition of bankrupt, and other persons, stating, that the petitioners had made enquiries into the character and circumstances of *Clarke*, the assignee, and found him unfit for the trust, and praying that he might be discharged, or that one *Richardson* might be joined with him as assignee; the commissioners were ordered to proceed to a new choice, 16th Nov. 1735. — *Ex parte Rooth re Rooth*: Petition by bankrupt, stating, that his estate had been assigned to *Killeck* and *Dumello*, that the estate consisted of several outstanding debts, that *Killeck* was dead, and that *Dumello* had neglected to take any steps towards getting in the outstanding debts, by reason of which several good debts had become desperate, and others were entirely lost; and praying, that *Dumello* might assign the outstanding debts to the petitioner, or to such other person as might be thought fit, to sue for the same in the name of *Dumello*; and it was ordered, that *Dumello*, upon being indemnified against the costs of any suit in

respect of such debts, should give a proper authority to the petitioner to sue in his name for such debts, and that all monies recovered should be paid by petitioner to *Dumello*, for benefit of himself and the other creditors under the commission, August 10, 1734. — *Ex parte Langford re Langford*: Petition by the bankrupt, stated that his assignees had possessed themselves of his goods to a considerable amount, and had kept the same eight or nine months packed up, after the same were appraised, before disposing thereof, whereby they suffered great damage, and that the same were sold at prices much below their value; that the assignees had possessed themselves of petitioner's real estates, but had not sold the same, though they had been offered the full value thereof; and that by such dilatory proceedings of the said assignees, the petitioner's allowance would be greatly diminished: and prayed, that the said assignees might be ordered to account before the commissioners, and that the petitioner's estates might be forthwith sold before the commissioners, and that the assignees might be directed to balance accounts with the petitioner, and also to balance accounts between petitioner and his creditors, upon whom peti-

There is another circumstance which has introduced a discussion of a question of considerable importance,—whether a bankrupt executor can prove without the order of this Court: not an order declaratory of his right, but an order creating and originating his title; it does not appear to me, that you can find much assistance upon that subject from the statutes previous to the 5th Geo. II., but, supposing that my mind were not warped by the variety of cases that have impressed themselves upon it during the last fifty years, I could not have maintained that a bankrupt executor should prove as against himself, that the bankruptcy was to introduce into his cha-

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tioner had any cross demands, and that petitioner might have all just allowances in taking the accounts, and that the produce of the petitioner's real and personal estate might be forthwith distributed; and it was ordered as prayed, 23d December 1741.—*Ex parte Phillips re Phillips*: Petition by bankrupt, stating that before any dividend had been made, petitioner's father died, leaving *Wm. Brock* executor under his will, whereby he gave to the petitioner all his estate, which was much more than sufficient to pay all petitioner's just debts under the commission; that, notwithstanding, the assignees had filed a bill against *Brock*, claiming to have the whole residue paid over to them; that petitioner is extremely desirous that his assignees should have as little interference as possible with his said father's estate, and that the debts proved under the commission should be paid by *Brock*; and praying, that the assignees should account to *Brock*, that an account should be taken of the debts proved, and that on payment thereof by *Brock*, petitioner might have the residue paid to him instead of the assignees; that the assignees and creditors on being paid might sign their consent to the commission being superseded; and it was ordered that the assignees should account for what had been received by them, that the creditors on being paid should sign their consent to a supersedeas, and that on *Brock's* accounting to the assignees for the father's estate, the assignees should give up their suit, the costs to be paid out of the estate, 25th March 1800.

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racter the double relation of debtor and creditor: I think I may say, with the veracity of a witness, that at the time of the occurrence of those cases before Lord *Thurlow*, it was never conceived that there was any such anterior right; and that I am as sure as memory can enable me to be sure, that Lord *Thurlow's* opinion finally was, that a bankrupt executor ought not to prove without an order; that the court ought to see there had been that dealing by him as executor, which made it not less fit to trust him than any other honest man. Some cases on this subject have been found; the first occurred on the 30th of November 1733, immediately after the statute, in the matter of *Popjay*, where a bankrupt executor had committed a *devastavit*: there had been a suit in this Court upon an information filed by relators against the bankrupt, as being indebted as bankrupt and as executor; in that case the order made by Lord Chancellor *Talbot* was not that the bankrupt should prove, but that the relators should prove. Another case, decided by Lord *Hardwicke*, occurred in August 1737, *ex parte Roe*, in the matter of *Merryman*: there the petitioners were infants, legatees under the testator's will, the bankrupt was executor, and had proved the will and possessed himself of the property, keeping the legacies in his own hands; the petitioners prayed, that their father, and not the bankrupt, might be admitted to prove and receive the dividends for their use; it was ordered, that the father be admitted to prove; and a reference was made to the master to approve of a proper person as trustee to whom the dividends were to be paid; and I think you will find that the Court has never in any one instance made an order that a bankrupt executor should prove, except where it has been deemed perfectly harmless, and the Court has always annexed

that condition, which the admission of proof before the commissioners cannot annex, namely, that the funds should not come into the hands of the bankrupt; and the order given in that case is an intimation of the opinion of the Court, that a bankrupt executor could not prove without its order. It is unnecessary to go through all the cases upon the subject; but there are also *ex parte Llewellyn*; *Cooke* B. L. 153; *ex parte Ellis*, in *Winsmore's* bankruptcy (a), which last case does not appear to me to prove much, but only that certain specific effects were delivered over, no order being made as to proof. In *ex parte Leake* (b), the language of the order was (as appears by the secretary's book) not that the executor should prove, but that he should be admitted a creditor. It is a conditional admission that would bind the commissioners, and seems, according to the old notions in such cases of bankruptcy, to be equivalent to his being permitted to make oath as to his debt. In that case, you will see the language of a gentleman who afterwards executed the office of Lord Chancellor in Ireland, and whose opinions have great weight in this Court: he was startled when I asked him whether a bankrupt executor could prove without an order, and was clearly of opinion that he could not. (c) There are, I own, difficulties to be apprehended on both sides, but we must rather bear a

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(a) 1 *Atk.* 101.

(b) 2 B. C. C. 596.

(c) Some other cases were produced from the bankrupt office: *Ex parte Hogg re Pack*, 3 April 1756, where executor bankrupt had applied part of the assets to his own use, and the petitioners, who were creditors of the testa-

tor, prayed to be admitted creditors under the commission for the amount of what had been misapplied; it was ordered, that the bankrupt should be admitted a creditor for the amount, and at the request of the petitioners, signified by their counsel, the dividends to be paid to the bank-

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particular mischief than bend the law to the cure of it. Let us consider the variety of cases in which an executor may be called on to prove, if executors in all cases are to be permitted to prove. Lord *Thurlow*, in the cases before him, shewed that he thought the right way to proceed was by bill, and it was only the quantum of property that induced him to admit proof unless under a decree. Take the simple case of a bankrupt, executor and trustee for *A. B.*, who is entitled to the residue, and the debts and legacies paid; *A. B.* is an equitable creditor, and although he cannot take out a commission, he may prove and vote for the choice of assignees without an order. Now would it not be extraordinary, if the bankrupt could say, I owe you ten thousand pounds, and shall prove it, and sign my certificate; or if they both went to prove, how is that to be regulated without an order of the Court? Suppose the bankrupt executor had admitted assets to a creditor, and that creditor could maintain an action against him as executor, there that creditor would be legally entitled to prove against the executor: if there were twenty such creditors, and as many such legatees, and so on, the Court has always said in cases of that kind that it would not prevent a creditor who might bring action or suit from proving, provided he could ascertain what liquidated amount he was to prove, as in *ex parte Moody (a)*. I cannot repent the order I made in that case. I think I have the authority of Lord *Hardwicke*, in the cases mentioned this morning, for saying, that where the Court has permitted an executor to prove, it has ordered him to do so under the condition

rupt, to be applied by him in a creditor, and dividends to be course of administration.—*Ex* paid into the bank.—*Ex parte* *Brooks re Walker*, 1 June *Ellis re Shurmer*, 11 April 1790. 1793, *Cooke B.L.* 155; bankrupt (a) 2 *Rose*, 415. executor ordered to be admitted

of taking care of the estate, or rather it has permitted him to be admitted a creditor, for that is the most accurate way of putting it. Now in *ex parte Moody*, an order was made as in the case where Lord *Hardwicke* admitted the father to prove in the year 1737. There was one adult legatee, and an executor not fit to be trusted; the Court had ordered that the adult legatee, on behalf of himself and the infants, should prove for what was due to the testator; and that proof was ultimately admitted. My mind is strongly impressed that a bankrupt executor cannot prove against himself without an order of the Court; in that order originates his title to prove; and if that order be not an order pronouncing that he had an antecedent title to prove, then it appears to me that he can neither vote for the choice of assignees nor sign his certificate. It is true that, upon that view of the law, cases may be supposed in which the bankrupts could never obtain their certificate, and it is impossible to deny that there exists in every mind a feeling of regret to find that a man cannot have his certificate, where he is actually well entitled to it; but you must look to the mischief, on the other hand, of a bankrupt releasing himself from his debts by his own fraud. It is said that this will disturb a great many certificates, as to which the commissioners have acted upon the practice as stated; I do not think so. The mode of proving a certificate at law seems to be nothing more than producing proof of the Chancellor's allowance; and if that sanction has been obtained, I think no Chancellor would recall a certificate on that ground (a).

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The order, admitting an executor to prove, is not declaratory of an anterior right, but originates his title.

On this day the Lord Chancellor repeated his opinion on the several points before commented on. 17 March.

(a) In a subsequent case, *ex parte Marshall re Webster*, where bankrupt was executor of his

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Now, upon hearing, &c., I do think fit to declare, that an executor being a bankrupt is not entitled to be admitted a creditor under the commission against himself, in respect of a debt claimed to be due to him as such executor, without an order of the Lord Chancellor, Lord Keeper, &c. being first obtained for that purpose; and under the effect of all the circumstances of the case brought before me by the said recited petitions and by the affidavits, I do also think fit to declare and adjudge, that the choice made on the 3d day of November last of the said *George Carroll* as an assignee, ought not to have effect given to it; and as all the creditors who voted for the said *Charles Duff* and *James Wilkie*, voted for them together with the said *George Carroll*, the choice not standing good as to him, that the same fails also as to them; and that therefore there must be a new choice of assignees under the said commission.

LINC. INN. *Ex parte* MATHEWS.—In the matter of BING-
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Commission superseded, upon an *ex parte* application, on the ground that two of the commissioners were creditors of the bankrupt.

THIS was an *ex parte* application to supersede the commission, after the adjudication of the bankruptcy, on the ground, verified by affidavit, that two of the

creditor, and proved the debt under his own commission without an order, and upon that proof signed and carried his certificate; the Lord Chancellor, on a petition for that purpose, ordered the proof to be expunged, and sent the certificate back to the commissioners. *Mr. Glyn* for the petition, *Mr. Montagu contra*, 18 May 1822.

commissioners were creditors of the bankrupt; and the Lord Chancellor ordered it to be superseded accordingly. (a)

Mr. *Heald* for the petition.

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THE bankrupt, who previous to the issuing of the commission had been arrested on mesne process, at the suit of the petitioner, in respect of a debt claimed to be due from the bankrupt to him, as administrator of *William George Frith*, remained in custody when the proof of the debt was tendered under the commission. The commissioners refused to admit the proof, or to decide upon the validity of the debt, until the petitioner had discharged the bankrupt and discontinued the action. The petition prayed that the proof might be admitted, or, if necessary, that the validity of the debt might be investigated prior to the discharge of the bankrupt, or the relinquishment of the action.

A party tendering the proof or claim of a debt under a commission is entitled to the judgment of the commissioners upon his right to prove or claim before he discharges the bankrupt or relinquishes his action; but the bankrupt must be discharged and the action and all benefit from it relinquished, before the proof or claim is admitted upon the proceedings.

(a) The general order of the 25 July 1817, directs, that upon all applications for commissions of bankruptcy, requesting that the commission may be directed to persons named, the solicitors, in delivering to the Secretary of Bankrupts the names of the commissioners to be inserted in the commission, do at the same time

certify, that according to the best of their knowledge and belief, none of the said persons intended to be commissioners, or a commissioner, are or is in any manner creditors, or a creditor of the intended bankrupt. *Buck.* 99; *ex parte Prosser*, 2 *Rose*, 370; *ex parte Crundwell*, 2 *Mad.* 292.

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Mr. *Kenyon Parker* for the petition, referred to the 49 G. 3. c. 121. § 14., and to *ex parte Woolley*, 1 Rose 394. S. C. 2 Ves. & B. 253.

The Lord Chancellor ordered, that the petitioner should be at liberty forthwith to call a meeting of the commissioners; and that at such meeting the petitioner should be at liberty to tender to the commissioners the proof or claim of his said debt; and that the commissioners should inquire into the nature, validity and amount thereof, and determine whether the petitioner was entitled to make any and what proof or claim in respect thereof; and if the commissioners should be of opinion that the petitioner was entitled to prove or claim under the commission, in respect of his said debt, then that the petitioner, upon his discharging the bankrupt out of the custody he was detained in at the suit of the petitioner, and relinquishing his action and all benefit from the same, should be admitted a creditor accordingly. (a)

(a) 1 Montagu B. L. 155. Note 5.

Ex parte BEILBY and others.—In the matter of LINC. INN.
JOHN BOYES the elder, and GEORGE FOW- Nov. 1821.
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Ex parte HALL, and ANN his wife, MARGARET V. C.
BOYES the elder, and MARGARET BOYES the
younger.—In the matter of JOHN BOYES the
elder.

GEORGE FOWLER, by his will, dated the 27th day of November 1795, devised and bequeathed all the residue of his real and personal estate to his son-in-law the said *John Boyes* the elder and *John Thompson*, their heirs, executors, administrators, and assigns respectively, upon trust, as to one undivided moiety of all the said residue of his real and personal estate, for his daughter, the petitioner, *Margaret Boyes* the elder for her life, and after her death upon trust for all and every child and children of his said daughter, in such shares and proportions, manner and form, as the said *John Boyes* the elder and the petitioner *Margaret Boyes* the elder, the wife of the said *John Boyes* the elder, during their joint lives, or the survivor, should in manner therein mentioned appoint; and in default thereof, upon trust for all and every the child and children of the petitioner *Margaret Boyes* the elder, their heirs, executors, and administrators, equally to be divided amongst them at their respective ages of 21 years; and in case all the children of the petitioner *Margaret Boyes* the younger, one of the five children who had each a vested interest in one-fifth part of the trust funds after the death of their mother, subject to the power of appointment, was entitled to prove one-fifth part of the trust funds so misapplied against the estate of J. B., the dividends to be paid into the bank subject to the further order of the Court.

Residue given to the husband and A. B. in trust, amongst the other purposes of the will, as to a moiety for the wife for life; not intended a gift to her separate use, but subject to the absolute disposition of the husband. Husband having made a partial disposition of it by loan, held that the dividends coming from the estate of the borrowers were subject to the wife's equity.

Whether the gift of a particular fund to the husband in trust for the wife for life is to be intended as a gift to her separate use,—*Quære*.

Bequest to J. B. and J. T. in trust for the wife of J. B. for life, and after her death for the children of the wife of J. B., in such shares as J. B. and his wife or the survivor should appoint, and in default of appointment for all the children equally, to be divided at 21; there were five children of J. B. and his wife, and no appointment was made. J. B. sold out and advanced part of the trust funds to J. B., the younger and G. F. B., two of the children; and J. B., J. B. the younger, and G. F. B. became bankrupt.—Held that M. B. the

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elder should happen to die before their respective ages of 21 years, and without leaving issue living at their respective deaths, upon certain other trusts therein declared of the other moiety of his said real and personal estate; and the said testator thereby empowered his said trustees, at their discretion, absolutely to sell a close or parcel of meadow and pasture ground in the lordship of *Myton*, in the county of the town of *Kings-ton-upon-Hull*, then in his own occupation; and the said testator directed that the money arising from such sale should be placed out at interest by the said trustees, or the survivor of them, his executors or administrators, upon government or real securities, upon the like trusts, and for the intents and purposes therein expressed or declared, with respect to the residue of his real and personal estate, or as near to the same as the deaths of parties and other contingencies would admit; and the testator appointed the said *John Boyes* the elder and *Thompson* executors of his will.

Shortly after the testator's death, *John Boyes* the elder and *Thompson* proved the will; and there were five children of the petitioner *Margaret Boyes* the elder; that is to say, *John Boyes* the younger, the said *George Fowler Boyes*, *Benjamin Boyes*, and the petitioners *Ann Hall* and *Margaret Boyes* the younger; and no appointment was made amongst the said five children, pursuant to the power contained in the will.

For some time previous and up to the year 1805, *John Boyes* the elder carried on the business of a sugar-baker at *Sculcoates* in the county of *York*, in partnership with *John Carlill*; and *John Boyes* the elder at the same time carried on the business of a carpet manufacturer at *Wansford* in the said county of *York* on his own ac-

count; and *John Boyes* the elder and *Thompson*, or *John Boyes* the elder with the privity and consent of *Thompson*, lent and advanced the sum of £2,385 12s. 10d., a moiety of the produce of the said close of land so devised in trust as aforesaid, to and for the use of the said partnership of *John Boyes* the elder and *Carlill*. In 1805 the partnership of *John Boyes* the elder and *John Carlill* was dissolved, and thenceforth and until 1810, *John Boyes* the elder and *John Boyes* the younger carried on the *Wansford* business in partnership, and *John Boyes* the elder and *George Fowler Boyes* carried on the *Sculcoates* business in partnership, and *John Boyes* the elder and *George Fowler Boyes* took upon themselves the debts of the partnership of *John Boyes* the elder and *Carlill*, including the said debt of £2,385 12s. 10d. In 1810, *John Boyes* the elder retired from the said partnerships; and thenceforth *John Boyes* the younger, *George Fowler Boyes*, and *Benjamin Boyes*, in partnership, carried on the said *Wansford* business, under the firm of *John Boyes* and Brothers, and the *Sculcoates* business under the firm of *George Fowler Boyes* and Co., and took on themselves the debts of the said former partnerships, including the said debt of £2,385 12s. 10d. In the beginning of 1813, *Benjamin Boyes* retired from the said concern, and thenceforth up to the time of their bankruptcy, *John Boyes* the younger and *George Fowler Boyes* carried on the said concern in partnership, and they took upon themselves the debts of the said former partnerships, including the said debt of £2,385. 12s. 10d.

In the months of April, May, and August 1813, *John Boyes* the elder and *Thompson*, or *John Boyes* the elder with the privity and consent of *Thompson*, lent and advanced to *John Boyes* the younger, and *George Fowler*

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Boyes, upon their request, and for the purposes of their said partnerships, the sum of £9,686. 17s. 1d., part of the said bequeathed moiety of the residuary personal estate of the testator *George Fowler*, which sum of £9,686. 17s. 1d., together with the said sum of £2,885. 12s. 10d., constituted a debt of £12,072.9s.11d. owing by *John Boyes* the younger and *George Fowler Boyes* to the moiety of the residuary estate so given in trust as aforesaid at the time of their bankruptcy. *John Boyes* the elder, the petitioner *Margaret Boyes* the elder, *John Boyes* the younger, *George Fowler Boyes*, and *Benjamin Boyes*, at the request of *Thompson*, executed to him their joint and several bond, dated the 30th of October 1813, in the penal sum of £30,000., conditioned to be void, if *John Boyes* the elder, and *Margaret Boyes* the elder, *John Boyes* the younger, *George Fowler Boyes*, and *Benjamin Boyes*, or any of them, should indemnify *Thompson*, his heirs, executors, and administrators, from all suits, actions, claims, and demands whatsoever, by reason of the aforesaid loans of the said trust funds to the said *John Boyes* the elder, *John Boyes* the younger, *George Fowler Boyes*, *Benjamin Boyes*, or any one or more of them. The petitioner *Ann Hall*, then *Ann Boyes*, who attained the age of 21 in March 1808, on the 31st of December 1813 executed a memorandum at the foot of the said bond, whereby she agreed to join in indemnifying *Thompson* in such manner as in the condition of the said bond mentioned. In November 1816, separate commissions of bankrupt issued against *John Boyes* the elder and *George Fowler Boyes*; and in July 1817, a commission of bankrupt issued against *John Boyes* the younger; under which commissions they were respectively found bankrupts. The petitioner *Margaret Boyes* the younger, who attained her age of 21 in June 1819, exe-

cuted to *Thompson* a bond dated the 17th of January 1820, in the penal sum of £5,000, the condition of which last-mentioned bond was to indemnify *Thompson*, his heirs, executors, and administrators, from all suits, actions, claims, and demands whatsoever by reason of the loan of the said trust funds, with a proviso therein, that nothing in the said bond contained should prejudice the right of the said *Margaret Boyes* the younger, her executors, administrators, or assigns, to make *Thompson*, his executors or administrators, a formal party or parties to any action or suit at law or in equity, for all or any of the purposes therein mentioned, upon indemnifying him or them, or to pursue any remedies against any other person or persons in or about the premises. *Thompson* was admitted to prove the said sum of £12,072. 9s. 11d. against the separate estates of *John Boyes* the elder and *George Fowler Boyes*, under the separate commissions against them respectively. The first petition, which was by separate creditors of *John Boyes* the elder and *George Fowler Boyes*, prayed that the proof of the said sum of £12,072. 9s. 11d. against the separate estates of *John Boyes* the elder and *George Fowler Boyes*, might be expunged, with liberty to *Thompson*, on behalf of himself and *John Boyes* the elder, to prove that sum against the joint estates of *John Boyes* the younger and *George Fowler Boyes*, or to prove the £2,385. 12s. 10d. against the joint estate of *John Boyes* the elder, *John Boyes* the younger, *George Fowler Boyes*, and *Benjamin Boyes*, and the £9,686. 17s. 1d. against the joint estate of *John Boyes* the younger and *George Fowler Boyes*. Upon that petition an order was made, in August 1819, referring it to the Master to state by whom, to whom, and when and under what circumstances the said advances in the bond of indemnity mentioned were made, and whether *Thompson* was a party, or privy, or

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had subsequently assented thereto; the Master by his report in August 1820, stated the matters before mentioned, together with the manner in which the advances had been made.

The second petition prayed, that the proof of the said sum of £12,072. 9s. 11d. by *Thompson* might be altered, and might stand in the names of the petitioners or some of them, or in the names of some trustee for them, and the other cestuique trusts of the trust funds; and the petition of the first petitioners, for further directions upon the Master's report, was heard with the second petition.

May, July,
 Nov. 1821.

Mr. *Agar* and Mr. *Boteler* for the separate creditors of *John Boyes* the elder and *George Fowler Boyes*, the petitioners in the first petition.—The proof by *Thompson* against the separate estates of *John Boyes* the elder and *George Fowler Boyes* must be expunged. The breach of trust was joint, and resort must therefore be had to *Thompson*, who is solvent, before any proof can be admitted against the separate estate of *John Boyes* the elder, on the principle of *ex parte Elton*, 3 Ves. 238; *ex parte Abel*, 4 Ves. 837; if the estate of *John Boyes* the elder was subjected to the payment, his assignees might by bill call on *Thompson* to contribute, and to prevent circuity of suit this Court will oblige them to go against *Thompson* in the first instance; if *Thompson* paid, he could recover only a moiety; if both were bankrupts, and one had paid more than the other, contribution would have been directed, *Rogers and Mackenzie*, 4 Ves. 752, *Cooke* 539. At any rate, *Thompson* being *in pari delicto*, cannot be admitted a creditor on the estate of his co-trustee. The bond of indemnity precludes the petitioner, *Ann Hall*, from complaining of

the breach of trust; the proof must be confined to the interest of the petitioner, *Margaret Boyes* the younger; and though it was at first considered, that where an interest was subjected to a power of appointment it was not vested as long as the power subsisted, yet it must be admitted that it has since been held, that the share given in default of the exercise of the power of appointment, is a vested interest: she is therefore entitled to prove one-fifth against the estate of *John Boyes* the elder, but no more, since any encrease beyond the one-fifth is contingent, and must arise by an act subsequent to the bankruptcy. As *Margaret Boyes* the younger is entitled to nothing until after the death of her mother, the assignees of *John Boyes* the elder will be entitled to the dividends on the proof in respect of her one-fifth share during the life of her mother.

1821.
—
Ex parte
BEILBY.
In the matter
of
BOYES.

As to the right of *Margaret Boyes* the elder, no proof can be admitted for her against her husband's estate: it was not a gift to her separate use; he had an absolute right over her life-interest, and has exercised it by disposing of the trust funds: the mode of disposition is immaterial; and no part of the funds remaining in the husband's disposition at his bankruptcy, there can be no proof by her against his estate. It is found by the Master that the loan was to *John Boyes* the younger and *George Fowler Boyes* jointly; proof must therefore be made against their joint estate, on the part of some person as trustee.

Mr. Cullen and Mr. Duckworth for the petitioners in the second petition.

The proof against the separate estate of *John Boyes* the elder is right: there being no contribution in cases of *tert*, he is liable for the whole; trustees committing breach of trust, are jointly and severally liable, *Kibble*

1821.

Ex parte
BEILBY.
In the matter
of
BOYES.

v. Thompson, 3 *Brown*, C. C. 112. The bond of indemnity, in which *Ann Hall* has concurred by the memorandum signed by her, does not amount to more than a covenant not to sue one of two persons jointly liable, and is not a release of the other; *Hutton v. Eyre*, 6 *Taunt.* 289, 1 *Marsh.* 603; *Dean v. Newhall*, 8 T. R. 168; *Solly v. Forbes*, 2 *Brod. & Bing.* 38; *Dunn v. Slee*, *Holt*, 399; *Boulbee v. Stubbs*, 18 *Ves.* 20. Though it be construed as an assent by *Ann Hall* to the loan, the reservation in the bond of *Margaret Boyes* the younger preserves her remedy against her father, *ex parte Gifford*, 6 *Ves.* 808; *ex parte Glendinning*, *Buck.* 517; *ex parte Curstairs*, *Buck.* 560; and she is entitled to prove for the whole sum. The whole fund is given out and out in the first instance, though as to the individual share subject to be enlarged or contracted at the will of the parents, or the survivor of them. What share she may ultimately have is, indeed, uncertain, but it is as likely to be the whole, or nearly the whole, as one-fifth. If it is now cut down, she can never have all she may be entitled to hereafter: the debt, as against her father's estate, is not contingent, and his estate will not be damnified by such proof, since the funds will remain to be distributed according to the interests of those eventually entitled.

As to the petitioner, *Margaret Boyes* the elder, we say she is entitled to prove for the whole sum; the bequest is to trustees for her as a married woman, and to her husband as trustee for her: will the Court permit him, being such trustee, to exercise his marital power in prejudice of the trust, and must it not be considered as to her separate use? If not, and her husband had the absolute disposition of her life-interest, is this breach of trust an assignment of her life-interest? It

was merely a loan of the trust fund for a specific purpose; the husband did not intend it as a reduction of the legacy into possession, as appears by the bond in which it is treated as a debt to the cestuique trusts. Can the assignees of *John Boyes* the elder use his double character of trustee and husband to confirm his breach of trust?

1821.

Ex parte
BRILBY.

In the matter
of
BOYES.

Mr. Parker for the assignees of *John Boyes* the elder and of *George Fowler Boyes*.

The VICE CHANCELLOR.

The question is, what proofs are to be made against the estates of the father and of the two sons; the estate of the father is severally liable, in respect of his breach of trust by the loan of the trust funds, to every child who did not sanction that loan prior to the bankruptcy. It appears, however, that *Margaret Boyes* the younger is the only child who did not as to the father sanction that loan; she executed a deed of indemnity to *Thompson*, but she thereby expressly reserved to herself all other remedies.

There being five children, they took each a vested remainder in one-fifth part of the trust fund, subject to be divested by the exercise of the power of appointment given by the will of the grandfather. This power not being exercised at the time of the bankruptcy, the proof of *Margaret Boyes*, the daughter, must necessarily be confined to the one-fifth share, which was then her vested interest, although in the event of an appointment she may not be entitled to that share, and the proof may be to some extent for the benefit of others.

1821.
 ———
Ex parte
 BEILBY.
 In the matter
 of
 BOYES.

With respect to the claim of the wife to be considered as entitled to this trust fund to her separate use, because her husband was named a trustee of the fund, it is to be observed, that the husband is not the only trustee, and that the two trustees named are trustees, not for this particular fund, but for all the purposes of the will; and there is no sufficient ground therefore for the inference that the testator must have intended that she should take the life-interest in that trust fund to her separate use; what might be the inference if a husband was the sole trustee of a particular fund given to the wife for life, it is not necessary now to determine. If this interest be not given to the separate use of the wife, then as the husband might make an absolute disposition of it, and thereby defeat the wife's equity to a provision, so he might make a limited and partial disposition. Here the loan by the husband was a partial and not an absolute disposition, because repayment of the loan would have brought the trust fund back to the husband's estate, subject to the wife's equity, and in like manner repayment by dividends will revive the wife's equity to the extent of those dividends.

8th Nov.
 1821.

Upon the first petition it was ordered, that the proof of the said sum of £12,072. 6s. 11d. should be expunged, and that *Thompson* should be at liberty to prove that sum under the separate commissions against *George Fowler Boyes* and *John Boyes* the younger, against the joint estate of *George Fowler Boyes* and *John Boyes* the younger; the dividend to be paid into the bank and invested subject to the further order of the Court. Upon the second petition it was ordered, that *Margaret Boyes* the younger should be at liberty to prove £2,414. 9s. 4d., being one-fifth part of the said sum of £12,072. 6s., under the separate commission against

John Boyes the elder ; the assignees to pay the dividends thereon into the bank to be invested subject to the further order of the Court.

The costs of the first-mentioned petitioners, and of the assignees upon both petitions, to be paid out of the separate estate of *John Boyes* the elder.

1822.

Ex parte
BEILBY.

In the matter
of
BOYES.

Ex parte GREGORY.—In the matter of
GREGORY.

L. C.
LINC. INN.
Feb. 6,
1822.

THIS petition of the bankrupt stated, that in April 1821, the petitioner had presented a petition to supersede his commission, principally on the ground that the petitioning creditor's debt had been barred by the statute of limitations ; that upon the hearing of that petition, the Vice Chancellor ordered that the petitioner should be at liberty to bring an action of trover against his assignee, who was to admit possession of goods to the value of £5. ; that the petitioning creditors should defend the action in the name of the assignee, who was to be indemnified, and the action was to be tried in the Court of Common Pleas ; that all proceedings under the commission should be stayed until further order, and all further directions in the matter of the said petition were reserved until after the trial, when any of the parties were to be at liberty to apply as they should be advised. The petition further stated, that such action had been tried and a verdict found for the petitioner, subject to a point of law, and that in Michaelmas Term 1821 the Court of Common Pleas ordered a verdict to be entered generally for the defendant ; that the petitioner being advised that the said trial had not determined the validity

Upon the bankrupt's petition to supersede, an action was directed to be brought by the bankrupt against the assignee to try the validity of the commission, the petitioning creditors to defend the action ; and it was ordered, that the proceedings under the commission should be stayed until further order, and all further directions in the matter of the petition were reserved until after the trial, with liberty to apply.—The bankrupt having failed in the action, was taken in execution for the costs, and now, upon his petition to be discharged from that arrest, he was ordered to be discharged.

1822.

Ex parte
GREGORY.
In the matter
of
GREGORY.

of the petitioning creditor's debt had presented another petition to supersede the commission; pending which, the petitioning creditors had proceeded to tax the costs of the said action, and without the knowledge of his assignee had taken the petitioner in execution for the said costs, the petitioner therefore prayed to be discharged at the expence of the petitioning creditors.

Mr. *Horne* and Mr. *Roots* for the petition.

This arrest amounts to a contempt of the Court, being upon a proceeding directed by the Court in respect of which all further directions have been specially reserved. The assignee, the defendant on the record, could not have arrested the petitioner, and if the commission is ultimately superseded on the bankrupt's petition, he may apply for the costs of this action.

Mr. *Shadwell* and Mr. *Montagu* for the petitioning creditors.

The Vice Chancellor's rule is not to entertain the petition of a bankrupt to supersede where he has his remedy at law (a), and the reservation of further directions applied merely to the costs of that petition. The petition's standing over was a matter of indulgence to the bankrupt to save the expence of a new petition in the event of his succeeding at law. He has failed, and is bound by the legal consequences.

THE LORD CHANCELLOR.

I must consider this trial at law, accompanied as it is by a suspension of the proceedings under the commis-

(a) *Ex parte Billiald, Buck, 220.*

sion, and a reservation of further directions, to be a proceeding under the care and controul of the Court; and whether issue or action that the Court orders, a reservation of all further directions includes every thing arising from such proceeding at law: in this case, indeed, without acceding to the general rule that has been insisted on, the bankrupt may ultimately be ordered to pay the costs of his original petition, as well as of the action; still, however, this is not the mode of reaching these costs, which this Court must be considered to have taken under its own controul. Let the bankrupt be discharged, without prejudice to the question of liability to costs on the former petition and the trial at law, and reserve the costs of this petition.

1822.

Ex parte
GREGORY.
In the matter
of
GREGORY.

Ex parte BLAYDES.—In the matter of CALVERT.

L. C.
LINC. INN.
Feb. 28,
1822.

PETITION to stay the bankrupt's certificate. The petitioner being a creditor to a large amount of Messrs. *Staniforth* and *Blunt*, who had stopped payment, and being jointly interested with them in the proceeds of certain adventures to *Hayti*, which he sought to make available to the payment of his said debt, under an agreement entered into between the petitioner, Messrs. *Staniforth* and *Blunt*, and *Calvert*, *Calvert* gave his acceptances and promissory notes to the petitioner, to secure part of the debt so owing by Messrs. *Staniforth* and *Blunt*, and engaged to give a further security for £1,609, other part of that debt, in a certain event, which happened. In December 1820, the petitioner commenced an action against *Calvert* for be stayed until the petitioner had had reasonable time for ascertaining the debt and proving it, dismissed with costs.

A creditor having the bankrupt in custody, and presenting a petition to prove and stay the certificate, or to stay the certificate until the petitioner has had reasonable time to ascertain the amount of his debt, and to prove it, must discharge the bankrupt.

This petition, praying that the certificate might amount of his

1822.
 ———
Ex parte
 BLAYDES.
 In the matter
 of
 CALVERT.

non-performance of his agreement to give security for £1,609, for which sum *Calvert* was held to bail, and the petitioner obtained a verdict in that action, subject to a reference, which had not been proceeded upon at the time of *Calvert's* bankruptcy. On the 10th of December 1821, this commission issued against *Calvert*, who passed his last examination on the 22d of January 1822. On the 11th of February 1822 the petitioner filed his bill against *Calvert*, *Staniforth*, and *Blunt*, praying that the proceeds of the *Haytian* adventures might be applied towards the discharge of the debt of £1,609. The petition stated that the petitioner was wholly unable to ascertain what was due to him from the bankrupt, until the bankrupt and the other parties should have put in answers to his bill, but that, as the petitioner believed, his debt, when ascertained, would be more than sufficient to turn the certificate; and therefore prayed that the certificate might be stayed until the petitioner should have had reasonable time for ascertaining the amount of his debt, and proving the same.

Mr. Heald and *Mr. Cooper* for the petition.

Mr. Rose contra.

It does not appear that any proof has been tendered to the commissioners, without which this petition to stay the certificate cannot be effective; and there is no evidence by which the Court can satisfy itself, that in the result of the accounts sought to be taken the petitioner will have a debt sufficient to turn the certificate. The bankrupt is at this moment in custody at the suit of this petitioner, who is seeking by this petition in the bankruptcy to stay the certificate until his debt is ascertained

with a view to proof. The presenting of such a petition, which in itself operates to stay the certificate, is such an election to come in under the commission, as to entitle the bankrupt to his discharge under the 49th Geo. III. c. 121. § 14. *Ex parte Lord*, 2 Rose, 422; *ex parte Irvine*, Buck, 423.

1822.

Ex parte
BLAYDES.
In the matter
of
CALVERT.

Mr. Heald in reply.

The bankrupt has possession of that information which alone can enable the petitioner effectually to make his election, as to proceeding under the commission. Election, according to the statute 49 G. III. c. 121. § 14., is made only by proof or claim; but this petition is for preliminary information to enable the petitioner to make a future claim or proof. In *ex parte Irvine*, the order for the bankrupt's discharge was made at the same moment with the order for the petitioner to be admitted a creditor; and in the present case the bankrupt will be entitled to his discharge when he shall by his answer have furnished that information, the withholding of which prevents the petitioner from making out his debt, and placing himself in the situation of the petitioner in *ex parte Irvine*.

The LORD CHANCELLOR.

With respect to the bankrupt's discharge, I must have arrived at my conclusion in that case of *ex parte Lord* by reasoning it in this manner: that though it may be difficult to say, that the presentation of a petition by a person seeking to prove and stay the certificate, as a creditor whose debt would turn it, was either proof or claim within the letter of the statute (a); yet as the

(a) 49 G. 3. c. 121. s. 14.

1822.

Ex parte
BLAYDES.
In the matter
of
CALVERT.

staying the certificate is in the sound discretion of the Court, where the steps taken are similar, where the mischief is the same, the Court will apply the equity of the statute. The identity of mischief forms a legislative rule for the exercise of the discretion of the Court. Presenting such a petition is as much a pledge to prove, as entering a claim would be; and this petition cannot be entertained unless the petitioner claims to establish himself as a creditor under the commission. The petitioner is in this difficulty,—If I do not make an order, the bankrupt is discharged by his certificate; if I do make an order, he must be discharged under the equity of the statute.

On a subsequent day the Lord Chancellor allowed the certificate, and dismissed the petition with costs.

V. C.

LINC. INN.

March 1822.

No application to take a petition out of its turn can be heard, unless notice has been given of the intention to make such application.

Ex parte ———. In the matter of BELL.

UPON an application to advance this petition, the Vice Chancellor said, that in future he would not hear any application to take a petition out of its turn, unless notice of the intention to make such application had been given to the other side.

Ex parte GILPIN.—In the matter of SMITH.

THE affidavits in support of this petition were filed before the petition was answered, but affidavits had been made in answer, and the affidavits in answer replied to. Upon an objection to the reading of the first affidavits, the Vice Chancellor held that this objection might be waived by conduct, and that the respondent having filed affidavits in answer was precluded from making this objection.

V. C.
LINC. INN.
April 2,
1822.

Filing affidavits in answer is a waiver of the objection to the affidavits in support of the petition, that they were filed before the petition was presented.

*affirmed 2,
13.29.23,*

Ex parte SERGEANT, EMPSON, and BENNETT.
—In the matter of THOMAS PARKINSON the elder, THOMAS PARKINSON the younger, and LILLEY.

V. C.
LINC. INN.
July 1821.
April 1822.

THOMAS PARKINSON the elder and Thomas Parkinson the younger, carrying on a separate business in partnership, in October 1817, borrowed of Firth £1,000: for the repayment of which they, together with William Parkinson and the petitioner Sergeant, who had agreed to become sureties for that sum, executed to Firth, his executors, &c. their joint and separate bond.

Surety in a bond for the bankrupts, after the bankrupts obtain their certificate, joins with them in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety, held that this was not equivalent to payment by the surety so as to enable him to prove under the commission.

In March 1819, a commission of bankrupt issued against Thomas Parkinson the elder, Thomas Parkinson the younger, and Lilley, merchants and copartners. In September 1820, Firth died without having proved his debt, and the petitioners Empson and Bennett, who were his executors, proved his will, by virtue of which Ann Firth his widow, who was executrix, but did not prove, became beneficially entitled to the bond. The petitioner Sergeant, on the application of the executors,

1822.

Ex parte
SERGEANT,
EMPSON, and
BENNETT.
 In the matter
 of
PARKINSON
 the elder,
PARKINSON
 the younger,
 and **LILLEY.**

paid up the interest on the bond, but, not being prepared to pay the principal, on the 8th of December 1820, after the *Parkinsons* had obtained their certificate, the executors, with the consent of *Ann Firth*, took another bond in the same sum from *Thomas Parkinson* the elder, *Thomas Parkinson* the younger, the petitioner *Sergeant*, and *William Sergeant*, as in payment and satisfaction of the said sum of £1,000, and the original bond of October 1817 was delivered up to the petitioner *Sergeant*, who with the executors by this petition sought to prove the amount thereof with interest against the joint estate of the *Parkinsons*.

Mr. *Rose*, for the petition, contended that this did not in substance differ from the common case where the surety to a bond pays the debt after the bankruptcy; that the arrangement here adopted was equivalent to payment; that the acceptance of the new bond relieved the bankrupt's estate from the debt; that if a surety gives an indemnity which is accepted by the creditor in discharge of the bankrupt's estate, it is a payment which entitles him to prove.

Mr. *Roots* insisted that the surety, by becoming a party to the new bond, had abandoned the remedy he would otherwise have had against the estate, and created a new liability by which the old debt was extinguished.

The VICE CHANCELLOR.

Security has never been considered as equivalent to payment. This is clearly a release of the old debt. The surety has altered his character, and is no longer surety for the estate, but for a new obligation created subsequent to the certificate.

Petition dismissed with costs.

Ex parte LEVETT and another.—In the matter of
SENIOR.

V. C.
April 3,
1822.

THE last examination of the bankrupt had been several times adjourned upon his statement that he could not make a full disclosure of his estate without the production of the partnership books and papers, which were in the possession of his partner *John Higham*; who had refused to attend before the commissioners and to produce the books and papers in pursuance of the summons of the commissioners for that purpose.

The partner of the bankrupt ordered to attend before the commissioners to be examined, and to produce the partnership books and papers, there being no suggestion of his being indebted to the bankrupt, or having property of the bankrupt in his possession.

This petition of the assignees prayed that *John Higham* might be ordered to attend before the commissioners to be examined by them, and to produce the partnership books and papers.

Mr. *Roots* for the petition.

The VICE CHANCELLOR.

That an authority to summon and examine witnesses does not give power to compel their attendance is apparent from 1 Jac. 1. c. 15. § 10., which was in aid of the 13 Eliz. c. 7. § 5. Except in the case of persons known or suspected to be in possession of property of the bankrupt, or to be indebted to his estate (a), the commissioners have only power to examine persons present before them (b). In this case, it is not suggested that *Mr. Higham* had property of the bankrupt in his possession, or was indebted to the bankrupt's estate, and the commissioners therefore have no power to compel his attendance. You may take the order.

(a) By 3 G. 4. c. 81. § 1. commissioners, after they have qualified and before they have adjudged the bankruptcy, are empowered to compel the attendance of witnesses for the purpose of proving the trading and act of bankruptcy.
(b) 21 Jac. 1. c. 19. § 6.; 5 G. 2. c. 30. § 16.

V. C.
LINC. INN.
April 2,
1822.

Ex parte JONES.—In the matter of TATE.

Signature and sealing of the bankrupt's certificate by one of the commissioners not attested by the solicitor to the commission, or his clerk, or the messenger, or the clerk of such commissioner, in conformity to the general order of August 1809, the certificate sent back to the commissioners to recertify.

THIS was a petition by the assignee to stay the bankrupt's certificate, on the ground that the signature and sealing of the certificate by one of the commissioners was not in the presence of or attested by the solicitor to the commission, or any of his clerks, or by the messenger to the commission, or the clerk of the said commissioner, pursuant to the general order of August 1809. The certificate had been executed by that commissioner in Dublin, and the execution was attested by the master of the Liverpool steam-packet.

Mr. *Horne* for the petition.

Mr. *Girdlestone*, for the bankrupt, said, that as no fraud was imputed to any of the parties, this mistake in the form ought not to invalidate the certificate. The commissioner had since acknowledged his signature.

The VICE CHANCELLOR.

The subsequent acknowledgment of his signature by the commissioner cannot give validity to the certificate. The order is imperative. The certificate must be sent back to the commissioners to recertify.

The petitioner allowed his costs out of the estate. (a)

(a) By the general order of the commission, or some clerk of the solicitor, or by the messenger to the commission, or by some clerk of the commissioners respectively. such certificate by the solicitor to

Ex parte SERLE and others.—In the matter of
ROSSITER.

V. C.
LINC. INN,
April 29,
1822.

THIS petition of *Serle*, one of the assignees, and several other persons, creditors of the bankrupt, stated that a meeting of the creditors had been held pursuant to notice in the London Gazette, in order to assent to or dissent from the adoption of measures for the sale of the bankrupt's stock in trade and effects; and that the creditors present at such meeting being of opinion that it would be advisable to sell the same by private contract, resolved that it should be proposed to the petitioner *Serle* to take the said stock in trade and effects at the amount of the valuation which had been made thereof, and prayed that the petitioner *Serle* might be allowed to become the purchaser of the said stock in trade and effects at that said valuation, or that it might be referred to the commissioners to ascertain and certify whether the said stock in trade and effects could be more advantageously disposed of; and that in the event of the same being disposed of by public or private sale, that the petitioner *Serle* might be at liberty to become the purchaser thereof.

Though the creditors at a meeting convened by advertisement, sanction a sale of the bankrupt's effects at a valuation to one assignee, the Court will not order that the assignee should be allowed to become the purchaser, without a reference to ascertain whether the effects can be more advantageously disposed of.

The Vice Chancellor would not grant the prayer that *Serle* the assignee should become the purchaser at the valuation, but ordered a reference to the commissioners, to enquire and state whether the stock in trade and effects could be more advantageously disposed of than to *Serle*, according to the valuation, with liberty for any of the parties to apply when the commissioners should have made their report.

Aug. 9,
1822.

Ex parte
SERLE
and others.
In the matter
of
ROSSITER.

Upon the certificate of the commissioners that the stock in trade and effects might be advantageously sold to *Serle*, at the amount of the valuation, it was ordered by the Vice Chancellor that *Serle* should be allowed to become the purchaser at that amount.

Mr. Rose for the petition.

V. C.
LINC. INN,
Apr. 1, 1822.

Ex parte GREEN.—In the matter of HARRIS.

Held that "the costs of and occasioned by the application" include the costs of an interlocutory order made in pursuance of part of the application. Costs of the day can only be obtained by a special order at the time.

A PETITION was presented by *John Green*, a creditor, and then lately a partner of the bankrupt, praying that the commission might be superseded for concert; and that the costs and expences of superseding the same and of the application relative thereto might be paid by the bankrupt and the petitioning creditor; or that the partnership accounts might be taken, and upon the petitioner's paying the partnership debts, the partnership assets, to which the petitioner should be entitled, might be received by him; and that the assignees might be restrained from interfering with the partnership property. In February 1821 an interlocutory order was obtained, to restrain the assignees from interfering with the partnership effects. In April 1821, the petition coming on to be heard, an objection was made by the petitioner, that the affidavits in answer were improperly sworn; and the objection being allowed (*a*), the petition was directed to stand over. In July 1821 the petition was heard; and the Vice Chancellor ordered that the commission should be superseded, and that the costs of superseding the commission "together with the costs

(a) Ante, 16.

" of and occasioned by the present application" should be paid by the bankrupt and the petitioning creditor, who was also one of the assignees, and the solicitor who sued out the commission.

1822.

Ex parte
GREEN.
In the matter
of
HARRIS.

On the taxation of the costs under that last-mentioned order, the Master refused to allow the costs of the interlocutory order to restrain the assignees, or the costs of the day upon the petition standing over.

This was an application by Mr. *Hart*, that the Master might be directed to allow, in his taxation of costs, the costs of the day on the petition standing over; and the costs of the interlocutory order, on the ground that the costs of the interlocutory order, made in pursuance of part of the prayer of the petition, were meant to be included in the " costs of and occasioned by " the present application"; and that the interlocutory order was rendered necessary by the misconduct of the respondents.

Mr. Heald, contra.

The VICE CHANCELLOR, after referring to the Deputy Secretary, said that the " costs of and occasioned by the application" would include the costs of an interlocutory order, which was part of the application; but that, with respect to the costs of the day when a petition stands over, they could only be obtained by a special order made at the time.

LINC. INN.
March 27,
1822.

Ex parte MOORE and others.—In the matter of
GARTON.

Where the assignee was chosen before one commissioner only, and the assignment was executed to him by three commissioners, a new choice was directed.

THIS petition stated, that at the second meeting under the commission only one of the commissioners was present, and *Walker*, the petitioning creditor, elected himself sole assignee, and that an assignment to *Walker* had been afterwards executed by three commissioners; and therefore prayed that the choice might be set aside, and other assignees elected; and that the costs of such proceedings, and of the present application, might be paid by *Walker*.

Mr. *Wetherell* and Mr. *Montagu*, for the petition, contended that the choice in the presence of one commissioner being invalid, the assignment to the person so chosen could not be supported.

Mr. *Heald* and Mr. *Rose*, *contra*.

The VICE CHANCELLOR desired that this point of general practice might be mentioned to the Lord Chancellor; and the point being stated to the Lord Chancellor, his Lordship expressed his opinion that an assignment to a person not chosen at a meeting of the commissioners, but before one commissioner, was not according to the requisition of the statute (a), and was invalid; and upon the petition being subsequently mentioned before the Vice Chancellor,

Mr. *Heald* and Mr. *Rose* submitted, that though the choice were not according to the statute, yet that as the deed of assignment was properly executed, and recited that the choice was duly made, no advantage could be

(a) 5 G. 2. c. 30. § 26.

taken of this defect at law, evidence not being admissible to contradict the recitals, and that there was no reason for this Court to interfere, as no evil could result from the previous formal defect.

1822.

Ex parte
MOORE
and others.
In the matter
of
GARTON.

The VICE CHANCELLOR.

The question is not whether the assignment would or not confer a legal title upon the person there named as assignee, but whether that person ought to be invested with such legal title; and not having been duly chosen assignee, he cannot be permitted to sustain that character.

Let the choice be set aside, the costs of all parties to be paid out of the estate.

By the order, *Walker* was directed to join in executing an assignment to the new assignees.

Ex parte STONE and others.—In the matter of
WETTON and PAYNE.

V. C.
LINC. INN.
March 29,
1822.

FOR the accommodation of *Collier*, a bill at three months for £237, dated the 26th of February 1821, was drawn by the bankrupts upon and accepted by *Collier*, and shortly afterwards, on the 12th of March 1821, the bankrupts stopped payment. *Collier* was unable to discount the bill until the 4th of May 1821, when he persuaded *Blyth*, his brother-in-law, to give him cash for it. *Blyth* knew that the bankrupts had stopped payment; and *Blyth* being indebted to the

If a debtor to a bankrupt's estate acquire a bill with the bankrupt's name upon it, which he knows forms no demand upon the bankrupt's estate, after notice of the bankrupt's insolvency, and with a view to set off, he is not a *bonâ fide* holder.

1822.
 ———
Ex parte
 STONE
 and others.
 In the matter
 of
 WATTON and
 PAYNE.

bankrupts for goods purchased of them to the amount of £136. 18s. 4d., *Collier*, to induce him to cash the bill, represented to him that he might set off the bill against this debt. On the 9th of May this commission issued, and the bill being dishonoured, *Blyth* proved for the difference between the amount of the bill and his said debt: this was a petition to expunge that proof.

Mr. Horne and *Mr. Montagu* for the petition.

Had this been a *bonâ fide* transfer *Blyth* would have had a good demand, but it was made with knowledge on the part of *Blyth* of the drawer's insolvency: and that fact being established, the case of *Fair v. M'Iver* (a) is conclusive against the proof.

Mr. Cullen, contra, relied upon *Hankey v. Smith*, 3 Term Rep. 507.

THE VICE CHANCELLOR.

The question is whether *Blyth* was the holder of this bill *bonâ fide*. At the time he received the bill he must be taken to have known that *Collier* could have no demand upon it against the bankrupts: *prima facie* the acceptor is to pay; and *Blyth* does not pretend that *Collier* represented to him, that as between him, *Collier*, and the bankrupts, they were bound to pay the bill. As matters stood, there would have been no demand against the bankrupts estate upon the bill, and *Blyth* would have had to pay to the bankrupts estate the sum of £136. 18s. 4d. If *Blyth*, therefore, really paid the consideration of the bill to

(a) 16 East, 150.

Collier without any secret understanding between them, his purpose was to enable *Collier* to spend the money which he knew belonged to the bankrupts estate, and to convert the bankrupts estate into a debtor for £100, in the place of being a creditor for £136. Under such circumstances, he cannot be considered as the holder of the bill *bonâ fide*, and the debt must be expunged.

1822.

Ex parte
STONE
and others.
In the matter
of
WETTON and
PAYNE.

Ex parte HADLEY, and HADLEY and PICKERING, as assignees of N. HADLEY the younger.—
In the matter of THATCHER.

V. C.
LINC. INN.
April 1,
1822.

PETITION to stay the certificate.

The petition, supported by affidavit, stated that previous to the commission a partnership had subsisted between the petitioner *Hadley*, *N. Hadley* the younger, and *Thatcher*, which was dissolved by deed in 1813, and that *Thatcher* had become indebted to the petitioners upon the result of the partnership accounts: that in the year 1815 the petitioner *Hadley* and *N. Hadley* the younger had filed a bill for an account, to which *Thatcher* had put in his answer, and in 1817 a commission of bankruptcy issued against *N. Hadley* the younger: that before any further proceedings were had in that suit, in January 1821, this commission issued against *Thatcher*; that the petitioners applied to prove their debts under his commission, and several meetings were had before the commissioners and otherwise to investigate and ascertain such debt: that owing to the resistance of the bankrupt, and the obstacles which he had interposed to the settlement of the partnership accounts, the proof had not

Certificate stayed, upon the petition of the partner of the bankrupt, until the partnership accounts should be taken, no want of due diligence being imputable to the petitioner.

1822.

Ex parte
HADLEY, and
HADLEY and
PICKERING, as
assignees of
N. HADLEY
the younger.
In the matter
of
THATCHER.

been received; but on the 12th of May 1821 a claim to the amount of £2,000 was admitted on the proceedings, and the commissioners at the same time pledged themselves not to sign the certificate until an opportunity had been given for the investigation of the accounts, and directed that the accounts should be taken: that the bankrupt had afterwards passed his last examination, and the commissioners had inadvertently signed his certificate before an opportunity was given of investigating the accounts; and therefore praying that the allowance of the certificate might be stayed, that the petitioners might be at liberty to assent to or dissent from the allowance thereof; and that for such purpose it might be sent back to the commissioners to recertify.

Affidavits were filed on the part of the bankrupt, stating circumstances to shew that the delay in the final settlement of the partnership accounts had arisen from the conduct of the petitioners, and that there was no inadvertence on the part of the commissioners in the signature of the certificate.

Mr. *Hart* and Mr. *Montagu*, for the bankrupt, opposed the petition on the ground that the prayer to stay the certificate generally, and not until the accounts should be taken, could not be sustained; that such a petition must contain on the face of it a clear and sufficient case, *ex parte Cundall* (a), and though it be right in its object, if wrong in the specific relief prayed, ought to be dismissed, *ex parte Vernon* (b), *ex parte Ross* (c).

Mr. *Heald* and Mr. *Rose*, for the petition, contended that petitions to stay certificates had been entertained,

(a) Ante, 37.

(b) 13 Ves. 270.

(c) 17 Ves. 376.

though the petitioner's debt was disputed, and there was no prayer to prove, *ex parte Whitchurch* (a); and that the petitioner was at least entitled to have the certificate stayed until the accounts should be taken.

The VICE CHANCELLOR.

The relief sought by this petition certainly cannot be granted to the full extent prayed. The case of *ex parte Whitchurch* does not apply. That was an application to stay the certificate by a mortgages admitted to be a creditor, but the amount of the debt was disputed.

Upon the affidavits I see no reason to impute any want of reasonable diligence to the petitioners; and I must therefore stay the certificate until the partnership accounts are taken before the commissioners; and in order to secure the diligent prosecution of the accounts, let either party be at liberty to apply from time to time as they may be advised.

Ex parte SMITH.—In the matter of THATCHER.

PETITION to prove and stay the certificate. The commission issued in January 1821. The petition was presented in the following August.

Mr. *Montagu* for the bankrupt objected that this petition, one object of which was to prove, did not allege, that the petitioner had tendered his proof to the commissioners.

1822.

Ex parte
HADLEY, and
HADLEY and
PICKERING, as
assignees of
N. HADLEY
the younger.
In the matter
of
THATCHER.

V. C.
LINC. INN.
April 1,
1822.

Petition to prove
and stay certi-
ficate presented
eight months
after the issuing
of the commis-
sion, and the
delay not ac-
counted for,
dismissed with
costs.

(a) Ante, 71.

1822.

Ex parte
SMITH.
In the matter
of
THATCHER.

The Vice Chancellor admitted the objection (a), and Mr. Rose then contended that there was sufficient upon the face of the petition to induce the Court to stay the certificate.

Mr. Montagu said, that the delay of the petitioner unaccounted for was an answer to the petition.

THE VICE CHANCELLOR.

The commission issued in January, and this petition was not presented until August; eight months therefore have been suffered to elapse before the petitioner applies to prove and stay the certificate; and not accounting for his conduct, it is not reasonable that he should intercept, by further delay, the benefit which the law has given to the bankrupt. (b)

Petition dismissed with costs. (c)

(a) *Ex parte Curtis*, 1 Rose, 174. the certificate might be stayed, and that the petitioner might

(b) *Ex parte Dyson*, 1 Rose, 67. be at liberty to assent to or dissent from the allowance of it

(c) *Ex parte Ewart re Agton and Sanders*; the commission issued on the 31st of March 1821; afterwards the petitioner brought an action against the bankrupts and a partner not bankrupt, and in that action a verdict was taken at the summer assizes for 1821 for the defendant, for £5,300, subject to a reference. On the 14th of September 1821, the present petition was presented praying that upon the amount of his debt when ascertained. The Vice Chancellor refused the application, saying, that the creditor might, if he had thought fit, have come in at once under the commission, without prejudicing his claim against the solvent partner; and that having, for want of reasonable diligence, placed himself in his present situation, he was not entitled to the assistance of the Court.

Ex parte BLAKEY.—In the matter of BLAKEY.

L. C.
LING. INN.
April–May
1822.

BLAKEY and his partner *Sharpe* were, as it was alleged, indebted to *Perrin* and *Wilkinson*, who were partners, for money lent and advanced; *Wilkinson* became bankrupt; *Perrin* and two other persons were chosen assignees under his commission. Afterwards *Perrin* alone sued out a commission against *Blakey* upon the above-mentioned debt, his co-assignees not joining in the affidavit and bond upon striking the docket, or in the petition for the commission.

One of several assignees may sue out a commission in respect of a debt due to their bankrupt without the other assignees joining in the affidavit, &c. A commission issued on the petition of a solvent partner, who was one of the assignees of his bankrupt co-partner, in respect of a partnership debt, held regular, though the other assignees, did not join in the affidavit, &c.

This was a petition by the bankrupt *Blakey* to supersede his commission, and one of the objections was, that the commission was not properly sued out by *Perrin* alone upon that debt.

When the petition came on before the Vice Chancellor, his Honor inclined to think that the signature of one partner to the docket papers, in character of the assignee of the other partner, was not sufficient, but wished that the point should be mentioned to the Lord Chancellor; and it was accordingly argued before the Lord Chancellor.

April 1.

Mr. *Rose* for the petition insisted, that one of several assignees could not take out a commission; that the exception in the general order in favour of partners did not extend to assignees, *ex parte Morgan* (a); that this case differed from *ex parte Hodgkinson* (b), where both partners were solvent; and he referred to

May 14.

(a) *Buck*, 109.

(b) 2 *Rose*, 172, 19 *Ves*, 291.

1822. *Buckland v. Newsome*, 1 Taunt. 477. to shew that a court of law would entertain this objection.

Ex parte
BLAKY.
In the matter
of
BLAKY.

Mr. Agar and Mr. Lowndes contra.

Dissolution does not destroy the power of partners with respect to rights created during the partnership, *Wood v. Braddick* (a); one partner after dissolution may sign a bankrupt's certificate, *ex parte Hall* (b), and one partner therefore retains, after dissolution, the power of suing out a commission on a partnership debt; an assignee, too, differs from a trustee; one assignee may discharge by a receipt, may prove under a commission.

The LORD CHANCELLOR.

The circumstances of this case are singular. In one sense here is a dissolution of the partnership; one of two partners is bankrupt, and the solvent partner is one of the assignees of his bankrupt co-partner. It is stated to me to be the practice of the bankrupt office, to issue a commission upon the affidavit and petition of one of several assignees; and such being the practice, can it affect that practice, that the assignee petitioning for the commission also bears the character of solvent partner? It is not too immaterial to consider whether any distinction arises out of the circumstance that the dissolution is not a dissolution with respect to past debts: as to those there is still a species of partnership subsisting. Looking to what is stated as the established practice of the bankrupt office, I shall not hesitate to decide that these docket papers signed by *Perrin* alone are regular.

(a) 1 Taunt. 104.

(b) 17 Vca. 62.

Ex parte ABELL.—In the matter of ABELL.

V. C.

LINC. INN.

July 9, 1822.

PETITION by a bankrupt to supersede on the ground of no act of bankruptcy having been committed.

Petition by bankrupt to supersede for want of an act of bankruptcy, presented two years after the issuing of the commission, dismissed.

Mr. Parker for the petition.

Mr. Montagu, *contra*, stated, from the affidavits, that two years had elapsed since the commission issued: that Lord Hardwicke had held; in *Flower v. Herbert*, 2 Ves. 326. that after an acquiescence for a year and a half, a bankrupt should not be allowed to petition to supersede the commission.

The VICE CHANCELLOR.

This bankrupt, after submitting to his commission for two years, comes here in the first instance to supersede his commission, upon the legal ground that he had committed no act of bankruptcy; and this delay is not nor can in the nature of the fact be satisfactorily accounted for. Dismiss the petition.

WATKINS v. FLANAGAN.

V. C.

LINC. INN.

July 10,

1822.

BY indenture dated the 5th of March 1811, and made between the plaintiff of the first part, the defendant of the second part, and *James Martin* of the third part, the plaintiff, in consideration of £2,100 advanced and paid to him by *James Martin*, granted unto *James Martin*, his executors, administrators, and assigns, an

Surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the

grantee's proof under the grantor's commission, and to proceed by action against the grantor, having obtained his certificate, for the arrears of the annuity subsequent to the commission.

1822.

WATKINS
v.
FLANAGAN.

annuity of £300 for the life of the plaintiff, payable as therein mentioned; and the plaintiff thereby covenanted with *James Martin*, his executors, administrators, and assigns, that if the plaintiff should not pay the said annuity as therein mentioned, then the defendant, his heirs, executors, and administrators, would pay the same and all arrears thereof, and all costs, charges, and expences incurred by such non-payment; and there was in the said deed a clause for the re-purchase of the annuity by the plaintiff or defendant, at the price of £2,175, and the arrears due. And for better securing the said annuity by a warrant of attorney bearing even date with the indenture, the plaintiff and defendant authorized certain attornies therein named to confess judgment against them for the sum of £4,200 at the suit of *James Martin*.

For the indemnity of the defendant the plaintiff executed to him a bond, bearing even date with the deed and warrant of attorney, conditioned to be void if the plaintiff should indemnify the defendant against the payment of the annuity, and the covenants and agreements in the deed and warrant of attorney; and for further indemnity, the plaintiff gave to the defendant a warrant of attorney to confess judgment for the sum of £4,200.

In November 1812, the annuity being then in arrear, a commission of bankrupt issued against the plaintiff and his partner *William Cooper*, under which they were declared bankrupts; and the plaintiff's certificate was allowed by the Lord Chancellor in February 1813.

On the 10th of April 1813, *James Martin* proved the sum of £3,235, being the amount of the valuation of the annuity by the commissioners, and the further

sum of £198. 9s. 11d. for arrears at the date of the commission, making together the sum of £3,433. 9s. 11d., against the separate estate of the plaintiff.

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WATKINS
v.
FLANAGAN.

On or about the 10th of April 1813, the defendant, in order to redeem the annuity, agreed with *James Martin* to pay him the sum of £1,700, and to secure to him the further sum of £612. 19s. 1d. with interest, the said two sums making together the sum of £2,312. 19s. 1d. the full amount of the redemption money, and of the arrears then due; and in consideration thereof *James Martin* agreed to assign to the defendant all benefit of his proof. Accordingly, on or about the 10th of April 1813, the defendant redeemed the annuity by paying to *James Martin* the sum of £1,700, and securing to him the sum of £612. 19s. 1d. and interest; and *James Martin*, by indenture of assignment dated the 10th of April 1813, assigned to the defendant the debt of £3,433. 9s. 11d. so proved as aforesaid.

In June 1817, the defendant commenced an action against the plaintiff on the bond of indemnity; and upon demurrer, the judgment of the Court being for the plaintiff at law (a), a verdict was taken upon the inquiry for damages for £2,175, the amount of the redemption money.

The bill stated the above mentioned circumstances, and various instances in which the defendant had acted as creditor under the commission against the plaintiff, and prayed an injunction against the defendant's proceeding in his said action, and the delivery of the bond and warrant of

(a) *Flanagan v. Watkins*, 3 Barn. & Ald. 186.

1822.

—
 WATKINS
 v.
 FLANAGAN.

attorney given by the plaintiff to the defendant to be cancelled.

Mr. *Hart* and Mr. *Campbell* for the plaintiff.

Mr. *Heald* and Mr. *Rolfe* for the defendant.

The VICE CHANCELLOR.

10 July.

This bill is filed by the grantor of an annuity, who has become bankrupt and obtained his certificate, against the surety in the annuity deed, to restrain his action on the bond of indemnity, on the ground that the surety having since the commission redeemed the annuity, and being entitled to, and having elected to take, the benefit of the proof of the grantee for the value of the annuity under the grantor's commission, is precluded from any other remedy against the principal.

My first impression was in favour of the equity, but I have altered my opinion. Before Sir Samuel Romilly's act, if an annuity was secured by bond only, and arrears had accrued at the grantor's bankruptcy, and the bond was forfeited, the grantee was bound to prove under the commission, and the proof upon equitable principles was modified to the value of the annuity, and the arrears due, and the bankrupt was discharged from all future demands by his certificate. If, in addition to the bond, there was a deed of covenant, then the grantee was not bound to prove under the commission, but was entitled to resort to an action of covenant for the accruing arrears. Thus stood the law where there was no surety; and there is no reported case which shews how before the statute the surety would have been affected. Suppose

before the statute an annuity to have been secured by the bond only of the principal and a surety, and the bond forfeited at the bankruptcy, the grantee might have proved the value of the annuity against the bankrupt grantor, and have also proceeded against the surety by action on the bond; and though his judgment in such action would have been for the penalty, yet under the statute of Ann(a) the execution would have been limited to the arrears and growing payments. Although in such a case the grantee might thus prove against the principal, and at the same time proceed by action against the surety, yet he could not receive to his own use both the accruing arrears and the value of the annuity; he must have been a trustee for the surety of the dividends received under his proof to the extent in which the surety was damnified by payment of the arrears.

1822.

WATKINS
v.
FLANAGAN.

Taking such to have been the law as it affected principal and surety prior to Sir Samuel Romilly's act (b), the question is, how has that act varied the case. The eighth section, as to sureties in general, has no application further than in respect of arrears due at the bankruptcy (c). The consideration is, how far the question is affected by the seventeenth section, which provides for the proof of the value of the annuity, in what way soever the annuity be secured, and whether in the case of a bond it be forfeited or not forfeited at the bankruptcy, and which, in respect of such right of proof, does in terms discharge a bankrupt who obtains his certificate from all demands

(a) 4 Ann. c. 16. 2 Str. 814.

355; *Flanagan v. Watkins*, 3

(b) 49 G. 5. c. 121.

Barn. & Ald. 186.

(c) *Welsh v. Welsh*, 4 M. & S.

1822.

WALKINS
v.
FLANAGAN.

in respect of the annuity or arrears, whether the right of proof be exercised or not. At first sight it would seem that the discharge of the bankrupt from the annuity and the arrears would bar the future remedy of the surety against the bankrupt, but then follow these words, "in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved under the commission" (a). In respect to any other debt proved, or which might have been proved, under the commission, the certificate would bar the action of the creditor proving; but it would neither defeat the remedy of the creditor against the surety, nor the remedy of the surety against the bankrupt, for subsequent payments not due at the commission. I am of opinion, therefore, that notwithstanding his proof under the commission for the value of the annuity, a grantee has a right to resort to the surety for the payment of the annuity, and that for the arrears of the annuity subsequent to the commission, a surety is entitled to his action against the bankrupt, notwithstanding the certificate; and further, that the grantee under such circumstances is a trustee for the surety of the dividends received on his proof. I am bound, therefore, to declare that *Flanagan* is at liberty to pursue his execution on the judgment recovered, and at the same time to take the benefit of the proof. I think that judgment ought to have been entered for the amount of the arrears due subsequent to the commission, and not for the redemption money; but it was, I understand, taken for the amount of the redemption money by agreement of the parties, and probably the reason was, that the arrears exceeded the redemption money.

(a) § 17.

Ex parte BRYANT.—In the matter of COLLETT.

V. C.
LINC. INN.
July 10,
1822.

PETITION by one of the assignees to stay the bankrupt's certificate, on the ground of concealment of his effects.

Application to stay the certificate on the ground of concealment of property, where the circumstances of concealment had been disclosed, and the whole property delivered up to the assignees before the signature of the certificate by the commissioners, refused, but without costs.

It appeared that the bankrupt had secreted some of his effects, but the circumstances attending the concealment were by the examination of the bankrupt and his wife and other persons, disclosed to the commissioners before the bankrupt passed his last examination.

It was stated in the affidavit of the petitioner, on his information and belief, that some of the effects were not yet delivered up, but the bankrupt deposed that the whole of his effects were in the possession of his assignees before his last examination.

Mr. *Rose*, for the petition, contended, that though the commissioners, at the time they certified, were cognizant of the facts of the concealment, there was sufficient ground for the Court to interfere; that there was not in this case that voluntary disclosure contemplated by the act; that the discovery had been effected by the adverse exertions of the assignees, and that this forced conformity of the bankrupt was not such as to entitle him to his certificate.

Mr. *Whitmarsh* against the petition.

The VICE CHANCELLOR.

The statute says, that where a certificate is set up as a bar to an action, it shall be avoided by proof that it was obtained "unfairly and by fraud, or by proof of

1822.

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Ex parte
 BRYANT.
 In the matter
 of
 COLLETT.

concealment to the value of ten pounds" (a). This necessarily refers to a concealment at the time of signing the certificate. Here the fraudulent attempt of the bankrupt to conceal his property had been detected and exposed, and the commissioners thought fit to sign the certificate with a full knowledge of the facts (b).

Generally on the failure of a petition to stay a certificate, the bankrupt has his costs, but the misconduct of the bankrupt here justified this petition. Let the petition be dismissed without costs (c).

Mr. *Whitmarsh* applied for the bankrupt's costs to be paid out of the estate.

THE VICE CHANCELLOR.

I cannot allow the creditors to suffer for the bankrupt's misconduct. Let each party pay his own costs.

(a) 5 Geo. 2. c. 30. s. 7.

(c) *Ex parte Enderby*, 5 Mad.

(b) See *ex parte Tallis*, 1 Ball.
 & B. 321.

76. *Ex parte Stevens*, Buck.
 389.

Ex parte BURTON.—In the matter of FOSSETT, COOPER, and HOWARD.

V. C.
LINC. INN.
July 13,
1822.

IN and for some time previous to the month of August 1816, *Fossett, Cooper, and Howard* carried on the business of gunpowder manufacturers and merchants in partnership, under the firm of Messrs. *Fossett and Co.* By an indenture dated the 29th of August 1816, and executed by the said partners, the partnership was dissolved, and the debts and effects owing and belonging to the said partnership were assigned by *Cooper and Howard* to *Fossett*, and *Fossett* covenanted to discharge all the debts owing by the said partnership; and on the 31st of August 1816, notice was published in the London Gazette, stating the dissolution of the partnership, and that all the debts due to and owing by the partnership would be received and paid by *Fossett*. For some time after the 29th of August 1816, *Fossett* alone continued to carry on the said business, under the same firm; and on the 6th of June 1817 a commission of bankruptcy issued against him. On the 8th of July 1817 a joint commission issued against *Fossett, Cooper, and Howard*, and in November 1817 the separate commission was superseded at the costs of the separate estate of *Fossett*. At the time of the dissolution Lord *Elgin* was indebted to the said partnership in the sum of £60. 10s. on a balance of account, and that sum was received by the assignees under the joint commission from Lord *Elgin*, who had no notice of the assignment of the debts made by *Cooper and Howard* to *Fossett*. Previous to the dissolution the said partners consigned two hundred barrels of gunpowder to the house of *Bray and Jutting* at *Curacoa* for sale, on the account and risk of the said partners; and after the

Debts due to a partnership assigned upon the dissolution by the retiring partners to the continuing partner, without notice to the debtors, held, upon the bankruptcy of the partners, to remain in the order and disposition of the partnership, within the statute of James.

1822.

Ex parte
BURTON.
In the matter
of
FOSSETT,
COOPER,
and
HOWARD.

dissolution, *Bray* and *Jutting*, who had no notice of the assignment from *Cooper* and *Howard* to *Fossett*, invested part of the proceeds of that consignment in a cargo of tobacco, which in June 1817 was consigned to the house of *Campbell* and Co. at *Amsterdam*, for the account and risk of the said partners; and the assignees, by suit in the proper court of *Amsterdam*, recovered a balance of £163. 14s. in respect of such cargo.

Some other debts were received by the assignees, from debtors who had notice of the assignment from *Cooper* and *Howard* to *Fossett*.

This petition of joint creditors of the bankrupts stated the above-mentioned circumstances and prayed, that the several sums mentioned in the petition to have been received by the assignees might be declared to be part of the joint estate of the bankrupts.

Mr. *Stephen*, for the petitioner, cited *Ryall v. Rowles*, 1 *Ves.* 349., and *Jones v. Gibbons*, 9 *Ves.* 407. (a), as establishing the general proposition that an assignment of debts to a stranger did not, without notice to the debtors, operate to take them out of the statute of *James*, and urged that the principle must equally apply to an assignment to a partner, as the danger was the same.

Mr. *Horne*, *contra*, contended that money in the hands of an agent was not within the principle, and that in this case there could be no fictitious credit, as the assigning partners retired from trade, and that the assignee had a right of ownership in respect of the debts prior to and independent of the assignment.

(a) *Ex parte* *Monro*, *Buck*, 300.

Mr. Jacob for the assignees.

1822.

The VICE CHANCELLOR.

Ex parte
BURTON.
In the matter
of
FOSSETT,
COOPER,
and
HOWARD.

By the assignment from *Cooper* and *Howard* to *Fossett*, the latter became the true owner of the partnership debts; but until notice were given to the debtors, the debts remained in the order and disposition of the partnership. It is true, that *Fossett* stood in a different situation from a stranger, to whom the debts might have been assigned; because in his character of partner, and independently of the assignment, he was personally competent to receive and discharge the debts; but the answer is, that until notice were given to the debtors the other partners were equally competent to receive and discharge the debts; and therefore the order and disposition remained in the partnership.

It does not appear to me, therefore, that there is any substantial distinction between an assignment of debt to a stranger or a partner; and I am of opinion that the debts owing by those debtors, who had no notice of the assignment to *Fossett*, remained in the order and disposition of the partnership at the time of the bankruptcy, and are distributable amongst the joint creditors (a).

The order declared that the assignment of the 29th of August 1816 converted the debts which were due to the partnership from persons who had notice of such assignment, into the separate estate of *Fossett*, and that the said assignment did not convert the property in debts

(a) See the reasoning by the share of one partner in the partnership stock and debts to the Judges in *Ryall v. Rowles*, 1 Ves. 364, upon a mortgage of the copartner.

1822:

Ex parte
BURTON.
In the matter
of
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COOPER, and
HOWARD.

due to the partnership from persons who had no notice of the assignment; and it was ordered that the said several sums of £60. 10s. and £163. 14s. should be applied as part of the joint estate of the bankrupts, and that the other sums mentioned in the petition to have been received by the assignees, should be applied as part of the separate estate of *Fossett*; and that the costs of the petition should be paid out of his separate estate.

V. C.
LINC. INN.
July 15,
1822.

The bankrupt deposited with A. the title deeds of premises which he had previously mortgaged to R. and Co. After the bankruptcy it was agreed between R. and Co., A., and the assignees, that the assignees should sell the premises, and apply the proceeds in payment of R. and Co. and A. Upon a petition by the solicitor of the bankrupt, claiming a lien by deposit of the title deeds of the premises prior to A., held that there was no jurisdiction in bankruptcy to determine the priority of lien between A. and the petitioner; and that A. was not precluded from objecting to the jurisdiction by filing affidavits as to the merits.

Ex parte ALLISON.—In the matter of DOWNING.

BY indentures of the 29th and 30th of August 1816, *Downing* mortgaged to Messrs. *Rawson* and Co., amongst other things, the equity of redemption of certain leasehold premises held under two leases, dated respectively the 1st of April 1801 and the 1st of April 1806, which had been previously mortgaged by *Downing* to *Clay*. In September 1819, *Clay*, *Downing*, and *Rawson* and Co. assigned by way of mortgage the premises comprised in the lease of April 1801 to *Tomlinson*: the money due on *Clay's* mortgage was paid off, and the lease of 1806 was given up by *Clay* to *Downing*, but no re-assignment of the premises comprised in that lease was made by him. Sometime after September 1819, the lease of April 1806 was deposited by *Downing* with *Armitage*, as a security for a debt, and in June 1820 this commission issued. An agreement was entered into between the assignees, *Rawson* and Co., *Tomlinson* and *Armitage*, whereby it was agreed that these leasehold premises should be sold by auction, and the proceeds applied in payment of the said mortgages to *Tomlinson* and *Rawson* and Co.,

in the manner therein mentioned; and any surplus of the proceeds of the premises comprized in the lease of April 1806 was to be applied in payment of the debt to *Armitage*, for securing which that lease had been deposited. Accordingly, the leasehold premises were sold by the assignees by auction, and the proceeds applied in discharge of the mortgages of *Tomlinson* and *Rawson* and Co., and of the said debt to *Armitage*.

1822.

Ex parte
ALLISON.
In the matter
of
DOWNING.

The petitioner, who had been the solicitor of *Downing*, by this petition claimed an equitable lien upon the leasehold premises comprized in the lease of April 1806, prior to the lien of *Armitage*, by virtue, as it was alleged, of a prior deposit of that lease, which *Downing* had afterwards fraudulently obtained, and had deposited with *Armitage*, and prayed that the assignees might pay to the petitioner the proceeds of the sale of those leasehold premises. The assignees and *Armitage* were served with the petition.

Mr. *Agar*, Mr. *Horne*, Mr. *Wray*, and Mr. *Treslove* for the petition.

Mr. *Duckworth* for the assignees.

Mr. *Hart* and Mr. *Rose*, for *Armitage*, objected that there was no jurisdiction in bankruptcy to decide the question raised by this petition; that this was in effect a petition against *Armitage*, and the petitioner ought to have proceeded by bill; and cited *ex parte Tupper* (a), *ex parte Jackson* (b).

Mr. *Agar*, in reply, contended that *Armitage* had submitted himself to the jurisdiction by consenting to the

(a) 1 *Rose*, 179.

(b) 5 *Ves.* 357.

1822.

—
Ex parte
ALLISON.
In the matter
of
DOWNING.

sale by the assignees, and acceding to the usual proceedings under such sales in bankruptcy : that at least it was such a submission to the jurisdiction as not to entitle him to costs; he having, too, misled the petitioner by an apparent acknowledgment of the jurisdiction by filing affidavits as to the merits.

The VICE CHANCELLOR.

The question raised by this petition is one in which the estate of the bankrupt has no interest. It is quite immaterial to the general creditors of the bankrupt, whether the surplus produce of the leasehold property be applied to pay the particular debt of *Armitage*, or the particular debt of the petitioner; and I have no jurisdiction in bankruptcy to decide their private rights.

That *Armitage* has filed affidavits in answer to the petition is not sufficient to deprive him of costs: he was not certain that his objection to the jurisdiction would succeed, and was justified in stating the merits of his case.

Petition dismissed with costs.

WHITAKER v. HALL.

V. C.
LINC. INN.
Feb. 27,
1822.

PENELOPE WHITAKER purchased of Messrs. *Fry and Crutchly* an annuity for her life, for the sum of £2,000, payable at her death, and the £2,000 was secured by the conveyance of an estate to trustees, under indentures of lease and release of the 9th and 10th of March 1807; and it was agreed, that if *Penelope Whitaker* thought fit at any time to pay the sum of £2,000, or any part thereof, before her death, to *Fry and Crutchly*, their executors, &c., that she should receive during her life an additional annuity, equivalent to interest at £5 per cent. on what she should so pay. After the dissolution of the partnership between *Crutchly and Fry*, the contract with *Penelope Whitaker* became the separate engagement of *Fry*.

Penelope Whitaker employed *Fry* as her agent for the purchase of shares in certain waterworks, and advanced to him sums of money to the amount of £2,275 for that purpose; and *Fry*, instead of investing the same in such works, employed the greater part of such monies to his own use, and was at his bankruptcy indebted to *Penelope Whitaker* in respect thereof to the amount of £2,000 and upwards.

In November 1811 a commission of bankruptcy issued against *Fry*, and the assignees under that commission sold his interest in the said contract with *Penelope Whitaker*.

On the 11th of February 1818 *Penelope Whitaker* died. This bill was filed by the devisees and personal representative of *Penelope Whitaker*, against the assignees of *Fry*, the trustees in the conveyance for securing the

The bankrupt at the time of his bankruptcy was indebted to P.W. in respect of monies received by him as agent, and misapplied, and P.W. had purchased of the bankrupt an annuity for her life, in consideration of a sum payable at her death, and died after the bankruptcy. Held that the representatives of P.W. were not entitled to set off the consideration of the annuity against the debt due from the bankrupt. Not a case of mutual debt or credit within the 5 G. 2. c. 30. s. 28. unless the balance can be ascertained by computation. The principle, that he who comes into equity must do equity, applies only to equity arising out of the same transaction.

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£2,000, and the purchasers of the annuity, for an account of what was due to *Penelope Whitaker* from *Fry's* estate, in respect of the monies so paid to him, and of the arrears of the annuity; and also for an account of what was due from *Penelope Whitaker* to *Fry's* estate, in respect of the said £2,000, the consideration money of the said annuity, and the interest thereon; and that the balance on the one account might be set off against the balance on the other account; and for a reconveyance of the premises on which the said £2,000, the consideration of the said annuity, was secured: and the question in the cause was, whether the personal representative of *Penelope Whitaker* was entitled to set off the £2,000 payable from her estate at her death, against the debt due to her at the bankruptcy, under the 5 G. 2. c. 30. § 28.

Mr. *Horne* and Mr. *Temple*, for the plaintiff, insisted, that if the assignees had come to enforce their demand against the estate of *Penelope Whitaker* they could not have recovered without indemnifying her estate, on the authority of *Holland v. Calliford*, 2 Vern. 661, and the principle, that those who come into equity must do equity: that this case must be considered as if the assignees were plaintiffs: that the debt due from *Penelope Whitaker* ceased to be uncertain long before the suit was instituted, *Atkinson v. Elliot*, 7 T. R. 378: that the consideration for the annuity was at the bankruptcy capable of valuation, and the only contingency was the time of payment, not whether it would ever be payable.

Mr. *Heald*, Mr. *Bell*, Mr. *Phillimore*, and Mr. *Moore*, for the defendants, contended that the fraudulent conversion of the funds by *Fry* did not constitute a credit, and that the consideration for the annuity was not a debt within the statute at the time of the bankruptcy: that

Holland v. Calliford was a suit by the assignees, and, if applicable, was over-ruled by *ex parte Carwell*, 2 P. Wms. 497; *ex parte Barker*, 9 Ves. 118: that the doctrine in 2 P. Wms. 498, that a debt contingent at the bankruptcy was provable where the contingency happened before distribution, was in *ex parte Groome*, 1 Atk. 114, declared not to be law; and cited *ex parte Winchester*, 1 Atk. 115; *ex parte Prescott*, 1 Atk. 230; *ex parte Whitaker*, 1 Rose, 302.

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The VICE CHANCELLOR.

I am of opinion that the plaintiff cannot set off the £2,000 against the debt due to Mrs. *Whitaker* at the time of the bankruptcy.

This was not a case of mutual credit, for *Fry* obtained Mrs. *Whitaker's* money not upon credit but by fraud; nor of mutual debt capable of set off, for the debt due from Mrs. *Whitaker* being payable at the uncertain period of her death, was not the subject of computation, so as to ascertain the balance within the words of the statute.

It is true that a value might have been set upon the sum payable upon the contingency of Mrs. *Whitaker's* death; so a value might be set upon every sum payable upon a contingency by the bankrupt, for the purpose of proof against his estate; but it is enough to say, that the law has not provided for such a valuation.

It has been insisted that the assignees could not in equity receive the £2,000, without paying the debt due from the bankrupt, upon the authority of *Holland v. Calliford*, and the principle, that he who seeks equity

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must do equity. The authority of that case may be questioned; but there the debt due from the bankrupt arose upon the same contract which entitled him to the money to be raised upon the estate. The principle, that he who comes into equity must do equity, applies only to equity arising out of the same transaction (a).

*Raynolds
& Villars
2nd D
7/2*

V. C.
LINC. INN.
Apr. 3, 1822.

Where the mortgagor in possession was by express contract tenant at will to the mortgagee, held that the mortgagee was not entitled to the crops upon the mortgaged premises at the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners.

Whether a mortgagee could, in an action for mesne profits after judgment in ejectment against the mortgagor in possession of the mortgaged premises, recover the value of the crops severed and sold, subsequent to the day of the demise laid in the declaration, but before the delivery of possession by the sheriff, quære.

Ex parte TEMPLE and FISHE.—In the matter of SKINNER.

BY indentures of lease and release, dated the 2d and 3d days of May 1820, the bankrupt conveyed certain lands to the petitioner *Temple* in fee, by way of mortgage, for securing the sum of £3,500; and it was thereby provided that the bankrupt, who was in possession of the premises, should, during his occupation or tenancy, pay for the same unto the petitioner *Temple* the yearly rent of £175, being equal to the annual interest of the said sum of £3,500, at £5 per cent.; and that such rent should be taken, so far as the same would extend, in satisfaction of the interest from time to time to grow due on the said sum of £3,500; and that the petitioner *Temple* should have such remedies, by distress and sale or otherwise, for recovering the said yearly rent of £175, as landlords have by law for the recovery of rents upon common demises; but this agreement was in no manner to prejudice the mortgagee's right of entry.

By indenture dated the 7th of August 1820, the bankrupt mortgaged the same premises to the petitioner

(a) See *ex parte Whitaker*, 1 Rose, 302.

Fishe, by a demise for 1,000 years, to secure a sum of £500.

1822.

Ex parte
TEMPLE
and FISHE.
In the matter
of
SKINNER.

On the 10th of July 1821, the petitioner *Temple* applied to the commissioners for the usual order for sale, and stated, that owing to the decrease in the value of property, the premises would not produce sufficient to pay what was due on the said mortgages, and requested of the commissioners that the crops on the premises might also be sold, and on the said 10th of July 1821 the commissioners took the accounts of what was due in respect of the said two mortgages, and made the usual order for sale, but made no order as to the crops.

The petitioners subsequently, and before the crops were sold, made application to the assignees for possession of the premises, to enable them to take and sell the crops. The premises were sold pursuant to the said order for sale, and produced less than the amount of what had been found due to the first mortgagee. This petition, therefore, prayed that the assignees might account to the petitioners for the value of the crops on the premises at the time of the bankruptcy, or might deliver up such part thereof as had not been sold.

Mr. Hart and *Mr. Pepys* for the petition.

A mortgagor, though in some sense a tenant at will, is not entitled to emblements. The mortgagee determining the will is entitled to the land as it exists at the moment of the determination of the will, *Keech v. Hall*, *Douglas*, 21; *Moss v. Gallimore*, *Douglas*, 279; *Birch v. Wright*, 1 T. R. 383, where *Mr. Justice Buller* says, that the mortgagor is not entitled to the growing crops after the

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Ex parte
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will is determined. The mortgagee has a right to the estate at any moment he pleases, may bring ejectment at any time without notice, and is entitled to the estate, as it is, with the growing crops: he has a right to all the rents which have become due since the mortgage, and which are unpaid.

Mr. Bell and *Mr. Turner* contended, that a mortgagee was only entitled to the crop on the premises at the time of recovering possession; that the order for sale by the commissioners was not equivalent to delivery of possession by the sheriff; and that in this case there was an actual tenancy under the special provision in the mortgage deed.

THE VICE CHANCELLOR.

When it is said, that as between mortgagee and mortgagor the mortgagee is entitled to emblements, the meaning is, that when the mortgagor has personally occupied the premises, and the actual possession is afterwards delivered to the mortgagee by the sheriff or otherwise, the growing crops which are found upon the premises become part of the security, and may be applied by the mortgagee to his own use; but the principle does not apply to the case where the growing crops have been carried off by the mortgagor before the mortgagee obtains possession, and between the time of his demand and recovery of the possession. Let it be supposed, that a mortgagee recovers the possession by ejectment from a mortgagor, who had personally occupied the property, after the crops are severed and sold: such a mortgagee, might probably, if he thought it worth his while, bring an action for the mesne profits from the time of the demise laid; but could he recover from the mortgagor

any thing more than the same occupation rent which he could have recovered against a tenant of the mortgagor whose tenancy had commenced subsequently to the mortgage, and without the privity of the mortgagee? I do not apprehend that bankruptcy makes any difference in the principle. (a)

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There is however a specialty in this particular case, which makes the general principle indifferent to the decision. The mortgagor is here made, not a constructive or *quasi* tenant at will, but a tenant at will by express contract, and like every other tenant at will by contract, he would be plainly entitled to the emblements.

Petition dismissed without costs.

Ex parte HOOD and others.—In the matter of
FOULERTON.

V. C.
LINC. INN.
July 1822.

PETITION to recall the certificate.

This petition of the assignee, and of several creditors of the bankrupt, who had signed his certificate, stated that the bankrupt on his last examination had represented that his debts amounted to the sum of £15,900, and that there were debts owing to his estate

Certificate will
not be recalled
but upon a clear
case against the
bankrupt.

(a) See *Hodgson v. Gascoigne*, execution, if the sale or execution were subsequent to the day of the demise laid in the declaration, might be recovered in an action for mesne profits; and see *Partridge v. Bere*, 5 B. & A. 604.

1822.
Ex parte
 Hood
 and others.
 In the matter
 of
 FOULERTON.

to the amount of £9,042 : that upon the faith of such representations the petitioners had signed his certificate, which had been since confirmed by the Lord Chancellor; that since the confirmation of such certificate the petitioners had discovered, that the bankrupt had not upon his last examination made a full disclosure and discovery of his estate and effects: that he had included in such sum of £9,042 the proceeds of a cargo of goods shipped by him in 1817, in respect of which he then alleged that there was due to him the sum of £4,800 and upwards, being the whole of such proceeds, except the sum of £300 stated to have been realized by the sale of part of the cargo: that the petitioners had discovered, since the signing of the certificate, that the whole of such cargo had been disposed of, and the proceeds applied according to the directions of the bankrupt; and that there was nothing due to the estate in respect thereof, except the sum of £200, instead of the sum of £4,800 and upwards, described by the bankrupt at his last examination as available assets.

The deficiency charged in the petition was admitted in the affidavits in answer, but all intention of misrepresentation was negatived.

Upon the argument of this petition, a long and complicated series of accounts were entered into on both sides.

Mr. Heald and Mr. Wakefield for the petition.

Mr. Weiherell and Mr. Montagu against it.

The VICE CHANCELLOR, (after stating the petition and affidavits in explanation.)

July 18,
1822.

This is a petition to recall the bankrupt's certificate, upon the ground that it was not obtained fairly and without fraud; but that the bankrupt, in order to induce the creditors to sign his certificate, wilfully and fraudulently represented his estate to be of much greater value than it actually was. It is plain from the accounts that he represented his estate to be of much greater value than it actually proved to be; but although there are circumstances of suspicion, I cannot say that wilful misrepresentation is established; and in order to induce the Court to recall a certificate, a clear case must be made out against the bankrupt.

Ex parte
Hood
and others.
In the matter
of
FOULERTON.

Petition dismissed without costs. (a).

Ex parte WM. FAIRCHILD and ANN his wife.—
In the matter of ANDREWS.

V. C.
LINC. INN,
Aug. 1822.

SAMUEL BARNES by his will gave £1,000 navy 5 per cent. annuities to *Andrews* and *Boddington*, in trust to pay the yearly dividends to the brother of the testator for his life, and after his death to testator's sister, the petitioner, *Ann Fairchild*, for her life, and after the death of the survivor of them to transfer the said sum of £1,000 stock to *Andrews* absolutely.

Bequest of stock to A. and B. in trust to pay the dividends to testator's brother for life, and after his death to testator's sister, and upon the death of the survivor to A. absolutely.—A., the surviving

trustee, sold out the stock, applied the proceeds to his own use, and became bankrupt. Upon a petition by testator's sister and her husband, to prove the value of the stock sold, it was ordered, that the commissioners should compute the value of the stock so bequeathed at the commission, and that the husband should be at liberty to prove the amount of such value, the dividends to be paid into the bank, subject to the further order of the Court.

(a) *Anon*, *Davies*, 437. *Ex parte Cawthorne*, 19 Ves. 260. 2 *Rose*, 186. *Ex parte Tallis*, 1 Ball & B. 321.

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—
Ex parte
 FAIRCHILD
 and ANN
 his wife.
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 of
 ANDREWS.

Boddington died ; and afterwards *Andrews* sold out the navy 5 per cents., and applied the proceeds to his own use, subsequent to which this commission issued against him. This was a petition by *William Fairchild*, and the said *Ann Fairchild* his wife, who, before the issuing of the commission, had, by the death of the testator's brother, become entitled to the dividends on the stock ; and prayed that the petitioner *William Fairchild*, or some other person to be appointed by the Court, might be at liberty to prove the value of the said £1,000 stock under the commission ; and that proper directions might be given for the application of the dividends on such proof, so as to secure to the petitioner, *Ann Fairchild*, the payment of the dividends on the said stock.

Mr. Barber for the petition.

Mr. Beames for the assignees submitted, that the proof ought to be modified by the special direction of the Court : that it differed from the common cases of proof upon breach of trust, as *ex parte Watson* (a), *ex parte Moody* (b), and *ex parte Hetton* (c), where the bankrupt was merely a trustee ; but here the absolute property was in the bankrupt, subject to the life interest of *Ann Fairchild* : that it should be valued as an annuity ; as it would be hard upon the creditors, if the whole sum, which in reversion belonged to them, should be impounded.

The VICE CHANCELLOR said, that the assignees might sell the bankrupt's reversionary interest, and ordered that it be referred to the commissioners to compute the value of the said sum of £1,000 navy 5 per cent. annuities, at

(a) 2 Ves. & B. 414. (b) 2 Rose, 413. (c) Buck, 386.

the date of the commission; that the petitioner *William Fairchild* be at liberty to prove the amount of such value; that the dividends which should from time to time be declared upon such proof, (the amount to be verified upon affidavit), be paid into the bank of England, in the name of the Accountant General, in trust in this matter,—to be placed to an account entitled “The account of *Ann Fairchild* ;” and that the same when so paid in be laid out, &c., subject to the further order of the Court, with liberty to apply.

1822.

Ex parte
FAIRCHILD
and ANN
his Wife.
In the matter
of
ANDREWS.

Ex parte BERRYMAN.—In the matter of BERRYMAN.

V. C.
LINC. INN.
5 Aug.
1822.

APPLICATION by the bankrupt, who had omitted to surrender from apprehension, as it was stated in the petition, of some criminal proceedings against him, that the commissioners might be directed to call a meeting to take his surrender and examination.

Bankrupt permitted to surrender, where his omission to surrender arose from apprehension of a prosecution.

The VICE CHANCELLOR hesitated to make the order, the bankrupt's absence having been voluntary; but upon the case of *ex parte Shiles*, 2 *Rose*, 381. 1 *Mad.* 241, being referred to, it was ordered accordingly.

Mr. Cooper for the petition.

V. C.
LINC. INN.
5 Aug.
1822.

Ex parte READ.—In the matter of LYNN.

THE petitioner was the agent of the bankrupt, who had the command of a private trading ship, and traded to the East Indies.

Petitioner, being a creditor of the bankrupt on a cash balance, and being under acceptances for the bankrupt's accommodation which were not paid at the bankruptcy, and having received from the bankrupt bills of exchange and a promissory note to a larger amount than the cash balance, which were negotiated by the petitioner, not allowed to prove the cash balance, on the principle of excluding the dishonoured paper on both sides, or otherwise.

At the time of the bankruptcy the account between the petitioner and the bankrupt stood thus:—There was a cash balance of £3,576. 8s. 4d., including therein a sum of £1,603. 17s. 5d. for premiums of insurance and commission, due from *Lynn* to *Read*, and *Lynn* had given his promissory note for the said sum of £1,603. 17s. 5d. to *Read*, who had negotiated it, and it was proved under the commission. *Read* had accepted, for the accommodation of *Lynn*, bills drawn by *Lynn* to the amount of £6,444. 7s. 4d., none of which had been paid at the bankruptcy, and they were proved under the commission. *Read* had likewise guaranteed debts of *Lynn*, to the amount of £773. 1s. 5d., but had not at the bankruptcy paid any part of those debts, and they were proved under the commission. *Lynn* had given three bills for £1,000 each, drawn by him on *Stalker*, to *Read*, who had negotiated them, and those bills were dishonoured, and two of them were proved.

Lynn in account with *Read*.

Dr.		Cr.	
	£ s. d.		£ s. d.
Cash balance, including the £1,603. 17s. 5d.	3,576 8 4	Three bills for £1,000 each on <i>Stalker</i> , dishonoured, two of them proved - -	3,000 0
Bills accepted for accommodation of <i>Lynn</i> unpaid, proved - -	6,444 7 4	Note of <i>Lynn</i> proved - -	1,603 17 5
Debts guaranteed, proved	773 1 5		

The petitioner being insolvent, entered into a composition with his creditors, and paid the holders of the bills accepted for *Lynn's* accommodation, and the parties whose debts were guaranteed, a composition amounting in the whole to the sum of £1,894. 8s. 8d.

1822.

Ex parte
READ.

In the matter
of
LYNN.

The commissioners having rejected the proof of the petitioner, this petition prayed that the commissioners might be directed to exclude from both sides of the account the unpaid bills or liabilities, or that the petitioner might debit *Lynn's* account with the cash balance of £3,576. 8s. 4d., and with the balance, or difference between the amount of dividends paid by *Lynn's* estate upon *Stalker's* bills and *Lynn's* promissory note, and the amount of the composition paid by the petitioner to the holders of the accommodation bills, and the parties whose debts had been guaranteed; and that the petitioner might be admitted to prove the balance of the account according to the declaration of the Court.

Mr. *Bell* and Mr. *Blake* for the petition.

Though this case differs from *ex parte Walker* (a) and *ex parte Earle* (b), in this, that the petitioner is not bankrupt, yet it is within the principle of those cases; and the petitioner is entitled to prove the cash balance, and what has been paid by him on his accommodation bills, and upon the debts guaranteed, excluding the dishonoured paper on both sides: or, if he is not within that principle, at least he may prove his cash balance, the dividends being retained to meet what shall be

(a) 4 Ves. 373.

(b) 5 Ves. 355.

1822. overpaid by the bankrupt's estate on *Stalker's* bills, and the promissory note, upon the principle of *ex parte Metcalfe* (a) : or to prove the cash balance, undertaking to indemnify *Lynn's* estate against *Stalker's* bills and the promissory note.

Ex parte
 READ.
 In the matter
 of
 LYNN.

Mr. *Montagu* on the other side.

THE VICE CHANCELLOR.

It is not necessary to refer to *ex parte Walker* and *ex parte Earle*, inasmuch as the act of the 49 Geo. III. has introduced a new principle, by which cases of this sort must now be tried. By that act, a surety paying after the bankruptcy can only prove against the estate of the bankrupt where the creditor has not proved, or stand in the place of the creditor on the bankrupt's estate where the creditor has proved; and there cannot be double proof. Let the case of the accommodation bills be first tried by this principle—*Read* accepts, for the accommodation of the bankrupt, bills to the amount of £6,444, which remain wholly unpaid at the time of the bankruptcy; these bills are all proved by the holders under the commission, and if *Read* were now to pay these bills it would form no ground of further proof, and all that *Read* could claim would be to have the benefit of the proofs already made upon these bills against the estate. With respect to the cash balance, that part of it which is represented by the promissory note of £1603 is already proved against the estate by the holder of the note, with whom the petitioner had discounted it, and the actual payment by the petitioner could not now give him a larger right than to have the

benefit of that proof. The remainder of the cash balance, is more than covered by the two bills of *Stalker* which have been proved against the bankrupt's estate by the holders, with whom the petitioner negotiated them. It is hardly necessary to refer to the debts, amounting to £773, which were guaranteed by the petitioner, but which have been proved by the creditors against the bankrupt's estate.

1822.

Ex parte
READ.

In the matter
of
LYNN.

Petition dismissed without costs.

Ex parte DAVISON and others.—In the matter of
HARPER.

V. C.
LINC. INN.
Aug. 6,
1822.

THE petition stated, that an order had been made on the 18th of April 1821, by his Honor the Vice Chancellor, upon a petition presented by the petitioners, that Messrs. *Eicke* and *Evans* should forthwith pay to the petitioners the sum of £185. 14s., together with the costs of that application: that such costs had been taxed by the master at £19. 6s.; that a copy of the order, with a copy of the master's certificate, had been personally served upon *Eicke*, that payment of those sums had been demanded, and that he had refused to pay the same: and therefore prayed, that Messrs. *Eicke* and *Evans* might be ordered to pay to the petitioners, within four days, the said sums of £185. 14s. and £19. 6s., or stand committed; and that they might pay the costs of that application.

Where, under an order in bankruptcy, money is directed to be paid, the next order is to pay within four days or stand committed

Mr. *Beames*, for the petition, stated, that, in equity, to enforce an order for the payment of money by a person not a party to the cause, an order must be obtained to pay by a

1822.

Ex parte
DAVISON.
In the matter
of
HARPER.

given day, or stand committed; and on non-compliance, an *ex parte* order is made to pay by a given day or stand committed (a): but that, in bankruptcy, where money is ordered to be paid on or before a day named, the next order is to pay within four days or stand committed, without the intermediate order *nisi*.

The Vice Chancellor, after referring to the secretary, made the order as prayed.

V. C.
LINC. INN.
Aug. 7,
1822.

Ex parte WM. PARKES.—In the matter of JOHN PARKES the elder, JOHN PARKES the younger, and JOSIAH PARKES.

Covenant between vendor and purchaser that purchase money should be repaid within two years after resale discharges the vendor's lien.

PREVIOUS to the month of November 1817 the petitioner carried on business in partnership with *John Parkes* the elder, *John Parkes* the younger, *Josiah Parkes* and *Henry Parkes*, as worsted manufacturers; and the petitioner and *John Parkes* the elder were seised in fee of equal undivided moieties in the manufactory buildings. In November 1817 the partnership, as far as related to the petitioner and *Henry Parkes*, was dissolved, and a new concern commenced by the bankrupts, under the firm of *Parkes* and sons. Upon the dissolution the petitioner sold and conveyed his share in the manufactory buildings to *John Parkes* the elder, either on his separate account, or on behalf of the new firm, for the sum of £4,000, of which sum £3,000 was duly satisfied to the petitioner; and a deed of covenant, bearing

(a) *Anonymous*, 14 Ves. 207. *Parkins v. Morris*, 2 Dick. 691; *Higgins v. ———*, 8 Ves. 381.

date the 29th of November 1817, was entered into between the petitioner, *John Parkes* the elder and *Henry Parkes*, whereby it was amongst other things recited, that upon the statement of the account of the said dissolved partnership it appeared, that after giving the petitioner credit for the sum of £1,000, the residue of the said purchase money, the share and interest of the petitioner amounted to the sum of £1,675, and that it had been agreed that the said sum of £1,675 should remain in the hands of the bankrupts until the 3d day of June 1826, if they should continue to carry on business to that time, but if they should cease to carry on the same, or should dispose thereof to any other person, at any time between the 1st day of January 1822 and the 1st day of January 1824, then that they should pay the said sum of £1,675 within two years after they should so cease to carry on business or dispose of the same, with interest thereon. The bankrupts executed to the petitioner their joint and several bond bearing even date with the said deed of covenant for securing the said sum of £1,675, and a memorandum was indorsed thereon and signed by the petitioner, stating the said agreement in the said deed of covenant mentioned. In May 1822, the commission issued against the bankrupts, who were then in possession of the premises.

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The petition prayed, that it might be declared that the petitioner was entitled to a lien on the premises for the £1,000 and interest; that an account might be taken of what was due to the petitioner in respect thereof, and a sale of the premises for the payment.

Mr. Rose, for the petition, contended, that the acceptance of the bond for the unpaid purchase money did

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not divest the vendor of his lien, *Mackreth v. Symmons* (a), and *Elliott v. Edwards* (b); and that his lien not being in terms provided against by the deed of covenant, must be considered as subsisting.

Mr. Bell and Mr. Montagu, on the other side, said that though a bond from the vendee might not be a waiver of the vendor's lien, yet that in this case, third persons having joined in the security, the lien was discharged, and that the covenants were altogether inconsistent with the subsistence of a lien.

THE VICE CHANCELLOR.

The lien is not defeated by the bond, but by the provisions of the deed. The vendor consents to receive his purchase money two years after a resale of the premises by the bankrupt. This is impliedly an authority from the vendor to the bankrupt to take the premises discharged of the lien, and a consent to rely upon the personal security of the bankrupt.

Petition dismissed without costs.

(a) 15 Ves. 529.

(b) 3 Bos. & Pul. 181.

Ex parte GOULD.—In the matter of HARVEY:
and in the matter of WALKER.

V. C.
LINC. INN.
Aug. 5,
1822.

BY indenture of demise and mortgage, dated the 2d of September 1813, *Harvey* conveyed certain premises to the petitioner for a term of 1,000 years, to secure the repayment of £500, with a proviso for redemption. Shortly afterwards *Harvey* mortgaged the same premises in fee to *Walker*, to secure the re-payment of £450, subject to redemption. In June 1816 the commission issued against *Harvey*, and *Walker* became assignee under that commission. In September 1817 the petitioner applied to the commissioners under Lord *Loughborough's* order to take an account of what was due to him upon the said mortgage, and to have the mortgaged premises sold; and with the consent of *Walker* the account was taken, and the premises were put up to sale by auction under the order of the commissioners. *Fry* became the purchaser. In January 1820 a commission of bankruptcy issued against *Walker*. This petition of the first mortgagee stated the above-mentioned circumstances, that *Fry* had not paid his purchase money, and prayed an account of what remained due to the petitioner on the security of the mortgaged premises, and of what was due for principal and interest from *Fry* in respect of his purchase money, and that *Fry* might pay into the bank what should be found due from him on taking that last-mentioned account in trust in the matter of *Harvey*; and that thereupon *Fry* might be let into possession of the said premises, and that *Walker* and his assignees might be directed to join in executing a proper conveyance of the premises to *Fry*; and that the purchase money, after payment of the expences of the sale, might be ap-

Purchaser of bankrupt's mortgaged estate sold before the commissioners under the general order, upon petition in the bankruptcy, ordered to complete his purchase.

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plied in satisfaction of what remained due to the petitioner: or if the Court should be of opinion that *Fry* was not bound by his contract, then that the premises might be re-sold.

Fry did not appear upon the hearing of this petition, and the Vice Chancellor ordered that the commissioners should take an account of what was due from *Fry* in respect of his purchase money, that *Fry* should forthwith complete his purchase, that all proper parties should join in the conveyance pursuant to the conditions of sale, that the purchase money should be applied in satisfaction of the petitioner's mortgage debt and costs; that the commissioners should also take an account of what was due to *Walker* in respect of his mortgage, and that the surplus of the purchase money, after payment of the petitioner, should be applied to the discharge of what should be found due to *Walker*, and paid to his assignees, who were to be admitted to prove under the commission for the deficiency. (a)

(a) That biddings upon sales under a decree, see *ex parte Parlington*, 1 Ball & B. 209., and see commissioners of bankrupt, will *ex parte Green*, 1 Alk. 202. be opened in analogy to sales

Ex parte THOMAS NORRIS.—In the matter of
THOMAS NORRIS.

L. C.
LING. INN.
Aug. 20,
1822.

PETITION by the bankrupt to supersede his commission, bearing date the 1st of November 1820, at the costs of *Phillips* the petitioning creditor.

Where the act of bankruptcy on the proceedings was a conveyance of the bankrupt's estate and effects, which upon the evidence appeared not to be drawn according to the intention of the bankrupt, commission superseded.

The act of bankruptcy on the proceedings was a deed executed by *Thomas Norris* dated the 8th day of July 1820, whereby, after reciting that *Thomas Norris* was indebted to his son *John Norris* in the sum of £220 and upwards, and that for payment thereof, and for his natural love and affection for his said son, and other good and sufficient considerations him thereunto moving, he the said *Thomas Norris* had agreed to convey his estate and effects in the manner therein mentioned, it was witnessed, that for repaying the said sum of £220 and upwards, and in consideration of his natural love and affection for the said *John Norris* and of the sum of five shillings to the said *Thomas Norris* paid by the said *John Norris*, the said *Thomas Norris* bargained, sold, assigned and conveyed a certain copyhold estate of the said *Thomas Norris* therein mentioned, and all his stock in trade, debts, and personal estate and effects whatsoever to have and to hold the same unto the said *John Norris*, his heirs, executors, administrators and assigns, as his and their own property, for ever, with warranty against all persons whomsoever; and a receipt for the said sum of £220 was indorsed on the back of the said deed, and signed by the said *Thomas Norris*, and witnessed by his solicitor.

By the petition and affidavits in support of it, it was stated, that *Thomas Norris*, in the spring of 1820, intend-

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ing to emigrate to America, and being desirous that all his creditors should be satisfied their just debts, applied to the said solicitor (who was one of the commissioners under the commission) to draw a power of attorney to enable his son *John Norris* to act in the stead of him *Thomas Norris*, and to receive the debts owing to him, and to pay those due from him; that neither the said *Thomas Norris* nor the said *John Norris* ever desired the said solicitor to draw any deed or instrument except such power of attorney; that *Thomas Norris* was never informed by the said solicitor that the instrument executed by him was an act of bankruptcy; that neither the said *Thomas Norris* or *John Norris* was aware, until after the commission issued, that *Thomas Norris* had executed any instrument other than the said power of attorney he had so required; that the instrument executed by him, and which he believed to be merely such power of attorney, was never taken away from the office of the said solicitor, but was retained by the said solicitor in his own possession; that the assignment, the execution of which was the act of bankruptcy proved on the opening of the commission, was not according to the intention or instructions of the said *Thomas Norris*: that no sum of £220 was paid by the said *John Norris* to the said *Thomas Norris*; that at the time when the said *Thomas Norris* gave instructions to the said solicitor to draw the said power of attorney, he informed the said solicitor that he was indebted to *John Norris* for work and labour, and for monies given to *John Norris* by his relations, and received by the said *Thomas Norris*, to the amount in the whole, as was supposed, of £250, but that the said *Thomas Norris* never gave any instructions for drawing a deed to secure any sum due from *John Norris* to *Thomas Norris*; that some of the said *Thomas Norris's* goods were sold by the order of

John Norris, and that part only of the proceeds was received by *John Norris*, and the residue was received by the said solicitor; and that the commission was not put in operation till the fourth day of December 1820.

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—
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By the affidavits in answer it was stated, that in July 1820, the said solicitor received instructions from *Thomas Norris*, and his said son *John Norris*, to make a deed or power from *Thomas Norris* to *John Norris*, to enable *John Norris* to sell all his father's property, and for the settlement of his creditors; and that the said solicitor informed the said *Thomas Norris* that a deed of assignment was necessary for that purpose, and explained to the said *Thomas Norris* that such deed of assignment would be an act of bankruptcy, unless all the creditors concurred: that accordingly the said solicitor caused the said deed, bearing date the 8th of July 1820, to be drawn, and, having read to the said *Thomas Norris* the essential parts of the said deed, the said *Thomas Norris* executed the same: that in pursuance of the said deed, the said *John Norris* caused the greater part of the furniture of the said *Thomas Norris* to be sold; that part of the proceeds was paid to the said *John Norris*, and a small part was received by the solicitor in payment of his charges for drawing the said deed; that the said solicitor retained the said deed as a security for what was due to him for drawing the same, that it was in his possession at the time of the bankruptcy, and that the same was seen several times by the said *Thomas Norris* at the office of the said solicitor; that the said solicitor was not one of the commissioners who adjudged the bankruptcy.

Upon this petition coming on to be heard before the Vice Chancellor an issue was directed to try the validity of the commission.

1822. Against this order the bankrupt appealed.

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Mr. Cullen, Mr. Horne, and Mr. Montagu for the bankrupt.

Mr. Heald, Mr. Whitmarsh, and Mr. Rose for the assignees.

The LORD CHANCELLOR, (after reading the original petition and order.)

It does not appear to me that an issue to try the validity of the commission would reach the real question in this case: No doubt existing as to the trading, and the deed constituting an act of bankruptcy, as there were no special directions, the course would have been, that the petitioning creditor's debt being proved, and the instrument produced, the bankruptcy would have been found; but the real question would not be disposed of—Whether it is consistent with the due administration of justice that this instrument, regard being had to the circumstances of its execution, should be produced as an act of bankruptcy in any proceeding whatever; it may be that other acts of bankruptcy can be proved; but the question is, whether I am to let this commission stand upon an adjudication, proceeding upon a deed which by the evidence is not according to the intention of the parties. The bankrupt represents, that he instructed his solicitor to prepare a power of attorney to enable *John Norris* to collect his debts; the solicitor represents that the instructions of the bankrupt were to draw a deed or power to enable his son to sell his property for the benefit of his creditors; and upon a view of the instrument, it is found, that instead of a power to collect the debts, or a deed for the benefit of the creditors,

it is an assignment for the absolute benefit of the grantee, with a warranty against all the world, for considerations not a little singular, in a deed represented to be a deed for the creditors, but which makes no mention of creditors in any part of it. Upon the production of the deed before the acting commissioners, no intimation is given to them of what the solicitor now says was the object of the deed. If they had been so informed, they must have seen that the deed was not according to the instructions, and was no more the deed intended according to the representations now made by the solicitor, than it was the instrument for which the bankrupt states he gave instructions. It is a question of some nicety, upon the evidence, whether the bankrupt is right in saying he meant a power of attorney, or whether it was an assignment he directed to be made. If the deed had been according to the instructions, as they are stated by the solicitor, it would have been in law an act of bankruptcy; but the creditors would have had the option of treating it as an act of bankruptcy, or of acting under the deed: and looking to the smallness of the property, if the deed had been prepared according to his statement of his instructions from the bankrupt, it might have been much more beneficial to the creditors to have dealt with the property under that deed than under a commission; but the assignment actually executed, though an act of bankruptcy, is an absolute conveyance to one creditor, and cannot be used for the creditors at large, whom it was meant to benefit, as it is represented, except by working that small property under the operation of a commission. I see, too, that, without any reason to apprehend an extent or danger to the property, a provisional assignment has been executed; and I notice this particularly in order to take the opportunity of saying, that where commissioners execute a

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Commissioners ought to state, on the proceedings, their reasons for executing a provisional assignment.

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provisional assignment, they ought to state on the proceedings their reasons for making such assignment. If this deed is not drawn according to the instructions, and that it is not, appears not only from the representations of the bankrupt, but from the account of the solicitor himself, it cannot be considered the deed of the bankrupt; and I can have no difficulty in superseding the commission. I think that the present commission, as *Phillips's* commission, is superseded on a ground so special, that the general order ought not to operate against him so as to prevent his taking out another commission; if he can support it. I think I cannot, in superseding this commission, order the bankrupt to confirm the purchases made under it; but that the best course will be, to stay all proceedings under this commission, reserving the consideration of costs, with liberty after adjudication in the new commission to apply by a short petition to supersede this commission, and then giving liberty to the assignees under the new commission to affirm such sales as upon their enquiry, and upon their hearing those concerned for the bankrupt, it would be expedient for the creditors to have affirmed, and not affirming such as it would not be expedient for the creditors to have affirmed.

The following order was made:

Now upon hearing, &c. I do think fit to declare, that the particular ground upon which I determined to supersede the said commission of bankruptcy issued against the said *Thomas Norris* was the nature of the deed made the act of bankruptcy in the proceedings, and all the circumstances affecting that deed: And I do therefore order, that all further proceedings under the said commission of bankruptcy be and the same are, hereby

stayed; and the said commission, and the proceedings had and taken thereunder, be forthwith brought into and lodged in the office of my secretary of bankrupts, subject to my further order: And I do order that the said *Joseph Phillips*, the petitioning creditor under the said commission, be at liberty, if he shall think fit, again to become the petitioning creditor, and as such to take out a new commission of bankruptcy against the said *Thomas Norris*, such commission to be directed to London commissioners, with liberty, after the adjudication of the bankruptcy under such new commission, for the assignees to be chosen thereunder to prefer to me a petition in the matter of the bankruptcy, praying to supersede the said former commission, and to affirm such sales made thereunder as upon their enquiry it should be expedient for the said creditors of the aforesaid bankrupt to have affirmed, and not affirming such as it should not be expedient for the said creditors to have affirmed; and the said *Thomas Norris*, by his counsel, is to be at liberty to appear before me at the hearing of such petition; and the costs of all parties of and occasioned by the said petition were reserved until after the hearing of the said petition in that respect.

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L. C.
LINC. INN.
Aug. 17,
1822.

Ex parte CAWTHORNE.—In the matter of FOOT.

THE circumstances of this case, and the judgment of the Vice Chancellor, are reported ante page 116.

Where a mortgagee has without fraud or gross neglect parted with the possession of title deeds, which are deposited with another person equally innocent, whether the Court will take the possession from him,—*Quære.*

This was an appeal by *Cawthorne* and his co-assignee against that judgment.

Mr. *Fonblanque* and Mr. *Montagu* for the appellants.

The questions are, whether *Meux & Co.* ever had an equitable lien, and whether, if they had, they did not lose their priority under the circumstances stated, as against *Child* and *Vickers*, to the extent at least of *Child* and *Vickers* being entitled as against *Meux & Co.* to retain the title deeds deposited with them, for the purpose of thereby working out the payment of their debt. It is impossible now to dispute the doctrine, that deposit of title deeds established raises the inference of an equitable lien; but this case is distinguishable as the bankrupt here denies the fact of deposit, and the fact of deposit being denied by the bankrupt, there is no authority for saying it can be proved by evidence *aliunde*. *Ex parte Wetherell*, 11 Ves. 400. *Edge v. Worthington*, 1 Cox, 211. *Hankey v. Vernon*, 2 Cox, 14. In all the cases there was either an admission by the party depositing, or written evidence of the fact of deposit: This is the first case, where the fact of deposit has been attempted to be established on conflicting testimony, and the party not in possession: the doctrine is not favoured in this Court, and will not be extended.

The title deeds were in the hands of *Child* and *Vickers* for valuable consideration, and without knowledge of the

claim of *Meux & Co.*, and possession would give them priority. In *Head v. Egerton* (a), which is rather confirmed than contradicted by *Evans v. Bicknell* (b), no fraud was imputable to the first mortgagee, and yet the Court refused to compel a delivery of the mortgage deeds in the hands of the second mortgagee. *Beckett v. Cordley* (c) does not shew that a subsequent innocent mortgagee is to give up possession of the deeds. *Ex parte Pearse* (d).

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Mr. Cullen and Mr. Rose for *Meux & Co.*

In many cases the Court has determined on the balance of testimony as to an agreement to deposit. The priority of a mortgagee is not discharged unless there is fraud or gross negligence tantamount to fraud. The evidence of the bankrupt, uncertificated, not admissible: in *Russell v. Russell* (e) that question arose, and after his certificate the bankrupt's testimony was admitted. Here *Child* and *Vickers* receive the title deeds, with a presumption of some prior claim, from the circumstance of part only of the deeds being delivered to them.

The LORD CHANCELLOR.

I concur entirely in the opinion, that Messrs *Meux & Co.* would not lose their priority unless by fraud or gross negligence, and that there is nothing in this case to indicate a waiver of their lien. The case of *ex parte Pearse* does not apply, as here the separation of the deeds,

(a) 3 P. Wms. 279.

(b) 6 Ves. 191.

(c) 1 B. C. C. 353.

(d) Buck. 525.

(e) 1 B. C. C. 269.

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all of which had been in the hands of Messrs. *Meux* & Co., is accounted for. Two other points, however, have been made in the discussion before me; first, whether *Meux* & Co. had any equitable lien, and secondly, whether, if so, they would be entitled to take the title deeds out of the hands of *Child* and *Vickers* and there seems to me a good deal of weight in the latter point. All the cases before *Russell v. Russell* were cases in which the lawyers of those days would have said that mere deposit gave no interest, but only the embarrassment which the possession of the deeds created to the owner. From the time of *Russell v. Russell*, Lord *Thurlow* and Lord *Loughborough* came to the length of saying, that deposit, without more, was, as they sometimes expressed themselves, evidence of an agreement to mortgage; or, as it was at other times stated, operated as a mortgage, and they must have held that the party with whom the deposit was made might have filed a bill of foreclosure. If it is to be considered as an agreement partly performed, how is it to be proved? If in a cause it was proved by sufficient evidence independent of the party depositing, he could not be heard against that evidence. When you get to this extent, that mere deposit creates a mortgage, the first question is, was there deposit; how did the deeds come into the hands of the party; as according to Lord *Thurlow's* decisions, deposit unaccounted for is sufficient, founded upon this not very satisfactory ground, that the deeds could only be deposited upon an agreement to mortgage, though they might have been deposited in order to embarrass the proceedings of those having interest in them. If the rules of evidence permit that the bankrupt should be believed, (and they do if his evidence is to be admitted at all,) if his evidence is to be trusted, there was no deposit, as there can be no deposit without

the concurring mind of the party depositing; but upon the affidavits it appears to me, that the balance of evidence is in favour of the deposit with *Meux & Co.*

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The other question is deserving of consideration, whether, if *Meux & Co.* have innocently, without fraud or gross neglect, lost the actual possession of some of the deeds, and another person equally innocent has obtained possession of them, the Court will take the possession from him: On this point I have considerable doubt. *Beckett v. Cordley* long ago appeared to me a right decision. A man makes a mortgage of an estate, which is subject to the portions of his younger brothers and sisters, and they release their portions, the mortgagor agreeing to give them a fresh charge: the mortgagor then makes a second mortgage, and the second mortgagee considers himself as obtaining all the interest of the mortgagor, discharged of the portions: Lord *Thurlow* held that the second mortgagee had nothing but an equitable estate, that the release was the consideration for the agreement to give a fresh charge, and that the children had the priority: but the point as to the possession of the title deeds was not touched by that decision: that decision ruled, that a first mortgagee is trustee for all subsequent incumbrances, according to their priorities; but the subsequent incumbrancer in that case had no deeds, except the deeds creating the charge and mortgage: but if the second incumbrancer had got possession of any title deeds, whether the prior mortgagee could have taken them out of his hands, is a different question, untouched by that decision, and which would have created that species of embarrassment which existed before the decision of *Russell v. Russell*. Being clear upon the other points, I am desirous to reserve my opinion on this question of the retainer of the title deeds,

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which I should have wished to be decided in a cause. It is not immaterial that the assignment deposited with *Child and Vickers* refers to all the mesne assignments of this leasehold estate since the execution of the lease, (all of which are granted by that assignment to the grantee,) and *Child and Vickers* had notice from that assignment of those intermediate deeds. *Cawthorne* can have no right but as assignee of *Child and Vickers*; and I think that *Child and Vickers* cannot, with respect to *Meux & Co.*, be considered as having more than the possession of the title deeds.

An order was made (by consent of the parties) declaring that *Meux & Co.* had an equitable mortgage after the lien of *Cawthorne*, and that out of the proceeds of the sale of the mortgaged premises the assignees should be first paid the sum of £56. 7s. 6d., the residue of the lien of *Child and Vickers*, part having been discharged before the bankruptcy, and that the surplus should be applied in discharge of the equitable mortgage of *Meux & Co.*, who were to be admitted creditors under the commission for the deficiency.

L. C.
 Aug. 7.
 1822.

Ex parte **WILMSHURST.**—In the matter of
WIGNEY and SEYMOUR.

UPON appeal, the judgment of the Vice Chancellor, which is reported ante page 41., was affirmed.

Ex parte GUTHRIE.—In the matter of SAVERY.

L. C.
LINC. INN.
Nov. 13,
1822.

THIS commission, dated the 10th of June 1820, issued on the petition of *Samuel Bignold*, the Secretary to the Norwich Union Society for insurance against loss by fire, upon a debt due to that society from *Savery*, who was one of its agents.

Where there was error in the description of the petitioning creditor in the petition and commission, but the docket papers were correct, the petition and commission were ordered to be amended and made conformable to the docket papers after the commission had been prosecuted.

In the affidavit on striking the docket *Samuel Bignold* was described as secretary of the said society, and *Savery* was stated to be indebted to the society in the sum of £100 and upwards for premiums received by him to the use of the society: in the bond *Samuel Bignold* was described as such secretary, and the condition was to prove that *Savery* stood indebted to the society, &c.

In the petition for the commission it was stated that *Savery* had become indebted to *Samuel Bignold* in the sum of £100 and upwards: in the commission *Samuel Bignold* was mentioned as a creditor of the bankrupt, and neither in the petition or in the commission was he described as secretary to the said society.

This petition, which was by one of the assignees (his co-assignee being the London secretary of the said society, as well as of the Norwich Union Society for insurances of lives and survivorship), stated the circumstances aforesaid, and that the bankrupt had paid divers sums of money to the said Norwich Union Society for insurance of lives and survivorship, either after or in contemplation of an act of bankruptcy; that the petitioner, under

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 GUTHRIE.
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 SAVERY.

the direction of the Court, had brought an action against two of the directors of said Norwich Union Life Society, who were likewise directors of the said Fire Society; for the recovery of part of such monies; and that upon the trial of the said action the plaintiff was nonsuited, on the ground that the proof of a debt of £100 and upwards from *Savery* to the said Norwich Union Fire Society did not sustain the commission; and prayed that the commission and petition might be amended by stating the debt of £100 and upwards to be due from *Savery* to the said Fire Society; or that a new commission might issue, dated on the 10th of June 1820; or that the said two directors, the defendants in the said action, might be restrained from availing themselves of the said objection at law.

Mr. *Shadwell* and Mr. *Montagu* for the petition, submitted that the misdescription being in the petition and commission only, and not arising therefore from the neglect of the party, but from the error of the officer, was not within those cases where the Court had refused, after the opening, to correct errors in the commission arising from the act of the party.

Mr. *Hart* for the petitioning creditor did not oppose the petition.

Mr. *Bickersteth* for the other assignee said, that his client was advised, that if the amendment was made as prayed, the commission could not be supported, as *Samuel Bignold* was not, as secretary, authorized to take out a commission by virtue of the powers given by the act of parliament enabling the society to bring actions in the name of the secretary.

The LORD CHANCELLOR.

1822.

Ex parte
GUTHRIE.
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of
SAVERY.

In the late acts relative to insurance societies, the legislature has been careful to provide, that execution upon a judgment against the nominal defendant may be taken out against any member of the society, and that the names of the members should be enrolled; but the provision as to enrolment was impracticable in respect of this society, in which all the insurers are members. Looking at the section of this act (a), in which the power to bring actions in the name of the secretary is connected with the words plaintiff or plaintiffs, it might seem difficult to extend it to the taking out a commission of bankruptcy; but I wish that question to remain open at law, unprejudiced by my acceding to the prayer for amendment. I think that the petition and

(a) 53 G. 3. c. 216. s. 1. It is enacted that all actions and suits to be commenced or instituted by or on behalf of the said society against any person or persons, or body or bodies politic or corporate, shall and lawfully may be commenced or instituted and prosecuted in the name or names of the secretary or secretaries for the time being of the said society, as the nominal plaintiff or plaintiffs for and on behalf of the said society; and that all actions and suits to be commenced or instituted against the said society, shall be commenced, instituted, or prosecuted against any one or more of the directors, or against the treasurer or treasurers, or against the secretary or secretaries for the time being of the said society, as the nominal defendant or defendants for and on behalf of the said society; and that all prosecutions to be brought, instituted, or carried on by or on behalf of the said society for fraud upon or against, or for embezzlement, robbery, or stealing of the property of the said society, or for any other offence committed against or with intent to injure or defraud the said society, shall or lawfully may be so brought or instituted or carried on in the name or names of the secretary or secretaries for the time being of the said society.

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Ex parte
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commission may be amended in this case, where there is the affidavit to amend by, and the necessity of amendment is created by the act of the officer.

The petition and commission ordered to be amended and made conformable to the docket papers; after such amendments the commission again to pass the great seal, and the costs of the application to be paid out of the estate (a).

L. C.
LINC. INN.
January 14,
1823.

Joint certificate of the two bankrupts ordered to be advertized for allowance as to the survivor, where one of the bankrupts died without having made the affidavit of conformity.

Ex parte COSSART.—In the matter of JOHN ISAAC COSSART and PETER COSSART.

THE joint certificate of the bankrupts was signed by the creditors, but *Peter Cossart* died without having made the affidavit of conformity. This was an application on the part of *John Isaac Cossart*, that the allowance of the certificate of the said bankrupts might be inserted in the London Gazette upon the usual certificate of the commissioners, and upon the affidavit of conformity made by the said *John Isaac Cossart* only.

Mr. Barber, for the bankrupt, cited *Bromley v. Goodere*, 1 *Atk.* 78; *Judway v. Brown*, 2 *Burr.* 718; *ex parte Currie*, 10 *Ves.* 51.

The LORD CHANCELLOR ordered "That inasmuch as no affidavit of conformity, as required by the statute,

(a) See *ex parte Lee*, 1 *Cox*, *Thompson*, 9 *Ves.* 207; *ex parte* 398; *Fisher's case*, 10 *Ves.* 190; *Sutton*, 1 *Rose*, 85; *ex parte Burrow's case*, *ibid.* 286; *ex parte Cheesewright*, 1 *Rose*, 228.

had been made by the deceased bankrupt during his life-time, the said certificate be advertized for allowance as to the said *John Isaac Cossart* alone; and that the further consideration of the subject-matter of the said certificate, as to the deceased bankrupt, do for the present stand over."

1823.
—
Ex parte
COSSART.
In the matter
of
COSSART.

Ex parte STOCKER.—In the matter of ROBERT COLLINS.

L. C.
LINC. INN.
January 29,
1823.

STOCKER being the holder of a bill of exchange accepted by *Robert Collins*, in the name of *R. Collins* and Co., on the 20th of January struck a docket against *Robert Collins* by the name of *Richard Collins*, and sued out a commission thereupon. On the 23d of January *Twell* struck a docket against *Robert Collins* by his right name (a), but no commission had been taken out thereon. On the 24th of January *Stocker* presented a petition, praying to be allowed to file a new affidavit, and execute a new bond, and that the misnomer in the commission might be corrected, and the commission resealed.

The first regular
docket in the
office has the
priority.

The LORD CHANCELLOR thought that the rule of the bankrupt office, that the party having the first regular docket in the office has the priority, was right, and ordered that *Twell* should be at liberty to sue out a commission against *Robert Collins*.

Mr. *Heald* for the petition.

Mr. *Rose contra*.

(a) *Ex parte Layton*, 6 Ves. 439; *ex parte Ward*, 1 Rose, 314.

L. C.
LINC. INN.
February 1,
1823.

Advertisement
of the bank-
ruptcy in the
Gazette sus-
pended, under
the circum-
stances, on the
petition of a
creditor, until
the next Gazette
day, when, upon
the consent of
all the creditors,
the commission
was superseded.

Ex parte OGILBY.—In the matter of ———.

THIS commission issued on the 16th of January 1823; the adjudication of the bankruptcy was made on the 31st of January, and the advertisement of the bankruptcy was directed to be inserted in the Gazette of Saturday the 1st of February. On that day this petition, supported by an affidavit in the terms of it, was presented by *Ogilby*, a creditor of the bankrupt to the amount of £11,000, stating that the creditors of the said bankrupt were only fifteen in number; that his debts amounted to the sum of £30,000 or thereabouts, and that his assets would produce £28,500 or thereabouts; as the petitioner was credibly informed and believed from an attentive examination of the accounts and affairs of the bankrupt; that the petitioner verily believed that if time were allowed for that purpose he the said petitioner could obtain the consent of all the creditors to a petition to supersede; and therefore praying that the publication of the order of adjudication might be suspended for such time as should be thought reasonable, in order to give the petitioner an opportunity of obtaining the consents of the creditors.

Mr. Montagu for the petition.

Mr. Rose for the petitioning creditor consented.

The LORD CHANCELLOR said he was not aware of any precedent for suspending the advertisement, except on the application of the bankrupt where there was a defect of legal requisities apparent on the proceedings,

and refused to make the order, unless a more specific affidavit was produced.

1823.

Ex parte
Ogilby.
In the matter
of

Afterwards, on the same day, another affidavit by the petitioner was produced, stating that he verily believed that it was the wish of all the creditors that the commission should be superseded; and that in case the deponent were allowed until Tuesday then next for that purpose, he believed he would have procured a petition signed by all the creditors, praying a supersedeas; and that since his application to the Court that morning he had seen several of the creditors, and from the conversation he had with them, and also from his previous knowledge of the intentions and wishes of the creditors, the deponent had no doubt of his being able to procure such consent.

The LORD CHANCELLOR directed that the advertisement should not be inserted in the Gazette on that day; and that the petitioner should be allowed until the following Tuesday to procure the signatures of the creditors to a petition to supersede: the costs of all parties to be paid by the petitioner. The bankrupt having obtained the signatures of all his creditors to his petition to supersede by the following Tuesday, the commission was superseded accordingly.

L. C.
LINC. INN.
March 6,
1823.

Petitioning creditor dying between the issuing and the opening of the commission, his executors permitted to prove the debt before the commissioners at the opening.

Ex parte WINWOOD.—In the matter of PARKER.

THE commission issued on the 8th of February, and the meeting of the commissioners for the opening was on the 16th of February. Before the meeting of the commissioners on the 16th of February, the petitioning creditor died, and this was an application by the executors of the petitioning creditor that they might be at liberty to attend the commissioners to prove the debt on which the commission issued; that the time for opening the commission might be enlarged, and the costs of this petition paid out of the estate; and the Lord Chancellor made the order accordingly.

Mr. Rose for the petition (a).

(a) The general order of the 20th November 1798 requires the attendance of the petitioning creditor before the commissioners at the opening of the commission, and an entry on the proceedings of the petitioning creditor's deposition as to his debt, and the condition of the bond to the Lord Chancellor, in conformity to the 23d section of the 5th G. 3. c. 30., is, that the petitioning creditor will prove his debt before the commissioners.

Ex parte MOORE.—In the matter of MOORE.

V. C.
LINC. INN.
March 26,
1823.

THIS petition of the bankrupt stated that his certificate having been duly signed by a sufficient number of creditors and the major part of the commissioners had been laid before the Lord Chancellor for confirmation on the 24th of December 1822: that on the 15th of January 1823 the petitioner had applied for his certificate, but found that on the 14th of January a petition had been presented by *William Moseley* against such certificate: that the petitioner had not been served with such petition, although the next petition day after the said 14th of January was on the 21st of January, and had long since passed; and therefore praying that the petition of the said *William Moseley* might be dismissed with costs, or that the same might be declared to have been abandoned, and that the certificate might be confirmed; and that *William Moseley* might be ordered to pay the costs of the present application and of his petition.

Where a petition to stay a certificate is not served before the next petition day, the course is for the bankrupt to present a short petition, praying that his certificate may be allowed.

Mr. Wakefield for the petition.

Mr. Montagu contra said, that when petitions against the certificate were not served before the next petition day, the course was for the bankrupt to present a short petition, praying to have the certificate allowed, with costs, if opposed (a); that such a petition would not have been opposed, but that the respondent was compelled to appear in order to resist the prayer for the dismissal of his petition with costs.

(a) 2 *Mont. B. L.* 154.

1823.

The VICE CHANCELLOR.

Ex parte
MOORE.
In the matter
of
MOORE.

The petition to stay the certificate not having been served before the next petition day so far became a nullity that it was not necessary for the bankrupt to present a petition to have it dismissed. The bankrupt had only to present a short petition, stating that the petition to stay the certificate had not been served, and that his certificate might be allowed, which would have been of course, inasmuch as there were no special circumstances. The bankrupt, having therefore unnecessarily extended his petition, has in a degree justified the opposition to it so that I cannot give him costs.

LINC. INN.
March 4,
1823.

Ex parte FURNIVAL.—In the matter of
FURNIVAL.

Admission by
the bankrupt of
the receipt of the
copy of a petition
to stay his certi-
ficate not a waiver
of personal ser-
vice.

PETITION by the bankrupt stated, that his certificate had been advertized for its allowance in the Gazette of the 9th of July 1822; that on the 29th of July a petition had been presented against the allowance, but the same had not been served upon the bankrupt; and prayed, that the certificate might be forthwith allowed, together with the costs of the present application, if opposed.

By an affidavit in answer to this petition it was stated that on the 31st of July a copy of the petition against the certificate, and the Lord Chancellor's order thereon, had been left at the lodgings of the bankrupt; that the bankrupt, by a letter dated the 12th of October 1822, addressed and sent by him to the solicitor for that petition, admitted the receipt of the copy of that petition, and

that on the 1st of November 1822 the bankrupt, at an interview with that solicitor, stated that he was not at home when that petition was brought, and that he then had it with him.

1823.
—
Ex parte
FURNIVAL.
In the matter
of
FURNIVAL.

Mr. *Hart* and Mr. *Montagu*, for the bankrupt, submitted that an admission of the receipt of the petition did not dispense with the necessity of personal service, and cited *ex parte Groome*, Buck. 40; *ex parte Kendall* 1 V. & B. 543; *ex parte Hopley*, ante, 63.

Mr. *Horne* and Mr. *Pemberton* on the other side.

The Lord Chancellor allowed the certificate. The question of costs was ordered to stand over.

In the matter of HAYES.

THE time for opening a town commission expired on the 2d of April, and an application was made this day on the part of the petitioning creditor by petition, not answered or signed, to enlarge the time for opening, on an affidavit stating that the commissioners had received satisfactory evidence of the petitioning creditor's debt and trading, but that the witness to prove the act of bankruptcy, a servant of the bankrupt, secreted himself, with the concurrence of the bankrupt, to avoid service of the summons, and the adjudication had been thereby prevented, and that there was a *bona fide* intention to prosecute the commission.

L. C.
LINC. INN.
March 27,
1823.

The time for opening a commission enlarged, where the adjudication had been prevented by the witness to prove the act of bankruptcy secreting himself in concert with the bankrupt.

1823. The Lord Chancellor enlarged the time for opening the commission until the 16th of April, without the petition being answered, and allowed the solicitor to sign the petition on behalf of the petitioner, with liberty to apply again if there was occasion.

In the matter
of
HAYES.

Mr. Beames in support of the application (a).

On two subsequent applications the Lord Chancellor further enlarged the time for opening the commission, severally for a fortnight, on affidavits stating that the witness still secreted himself and that the petitioning creditor, though he had used all diligence, had been unable to serve him.

V. C.
LINC. INN.
March 27,
1823.

Ex parte SMITH.—In the matter of LOUIS
HIPPOLITE MARTELLY.

Where there was a separate commission against one of three partners, and afterwards a commission against two of the firm, first commission ordered to be superseded, and the costs paid out of the joint estate.

Petitioning creditor under the first commission being a joint creditor, held entitled to his election under the second commission to prove against the joint or separate estate.

Commission against L. H. M. of Finsbury Square, in the city of London, instead of the county of Middlesex, not a material misdescription.

PREVIOUS to November 1822 *Louis Hippolite Martelly* had carried on business in partnership with *Polidore Martelly*, and had also carried on business in partnership with the said *Polidore Martelly* and *Justin Dayrie*. In November 1822, upon the petition of a joint creditor of *Louis Hippolite Martelly* and *Polidore Martelly*, a separate commission issued against *Louis Hippolite Martelly*, by the description of "*Louis Hippolite Martelly* of Finsbury Square in the city of London," instead of the

(a) *Ex parte Freeman*, 1 V. & B. 34—43. 1 Ross, 380. 384.

county of Middlesex. On the 28th of January 1823 a commission issued against the said *Hippolite Martelly* and *Justin Dayrie*, two of the firm of three partners (a); and the assignee under the last commission presented this petition praying that the separate commission against *Louis Hippolite Martelly* might be superseded.

1823.

Ex parte
SMITH.
In the matter
of
MARTELLY.

Mr. Heald and Mr. Montagu, for the petition, objected to the costs of the first commission being paid out of the joint estate, on the ground that the first commission was not sustainable on account of the said misdescription, and referred to the case *in re Gordon*, 2 *Mad.* 13., note (a), and to *ex parte Beckwith*, ante 20.

Mr. Cullen and Mr. Parker, for the assignees under the first commission, contended that there was no material misdescription of the bankrupt *Louis Hippolite Martelly*, and that the second commission not being against all the partners did not necessarily afford a more convenient means of administering the property of the bankrupts.

Mr. Glyn, for the petitioning creditor under the first commission, submitted, that upon this application by the assignees under the second commission, the joint commission would be superseded only upon the principle of

(a) By the 3 Geo. 4. c. 81. § 8. it is enacted, that any creditor or creditors whose debt or debts is or are of a nature and amount sufficient to entitle him; her, or them to petition for a commission of bankruptcy to be issued against all the partners of any firm, may petition for a commission against two or more partners of such firm; and that a commission may be issued upon such petition, which shall be valid at law to all intents and purposes whatsoever, notwithstanding it does not include all the partners of which the firm is composed.

1829.

Es parte
SMITH.
In the matter
of
MARTELLY.

convenience; and upon that principle the joint estate must bear the costs; that the petitioning creditor under the first commission was not to be prejudiced by the superseding of the commission for that purpose, and was entitled to his election under the second commission to proceed against the separate or against the joint estate.

The Vice Chancellor thought that whatever might be the powers of the assignees under the second commission as to the possession of the joint property of the three partners, as the operation of the eighth section of the act was to unite two separate commissions, that it must be more convenient to administer the property under the more extensive commission; that if the objection to the first commission on account of misdescription had been regularly before him, he should not have hesitated to say that it was a sufficient description, because being the known and popular, though not the legal description of the bankrupt, it could not induce any doubt of his identity; and was of opinion that the first commission should be superseded at the costs of the joint estate, and that the petitioning creditor under the first commission should have his election to prove under the second commission against the separate or the joint estate of *Louis Hippolite* and *Polidore Martelly*.

Es porte BAINES.—In the matter of WILLIAM V. C.
HEBDEN, ARTHUR OATES HEBDEN, and LINC. INN.
BROWNE. April 10,
1823.

IN February 1821, three separate commissions were taken out against the three bankrupts who had been in partnership. Under the commissions against *William Hebden* and *Browne*, assignees were chosen, but the choice of assignees under the commission against *Arthur Oates Hebden* was adjourned from time to time in consequence of a petition to supersede. Afterwards, and on the 9th of March 1821, a joint commission issued against the three bankrupts, and the assignees under the joint commission presented petitions in the three separate commissions to supersede at the costs of the petitioning creditor, or of the joint estate; and on the hearing of those petitions it was ordered, that the separate commissions should be superseded, and that the costs of superseding the same, with the costs of and occasioned by those applications respectively, should be paid out of the joint estate.

An order signed and passed cannot be corrected in respect of costs by a separate petition as to costs only: where the question is, not as to the personal payment of costs, but whether they are payable out of a particular fund, a petition for rehearing may be presented for the purpose of determining that question.

As the order did not include the costs of suing forth and prosecuting the separate commissions, the petitioning creditor under those commissions, after the order was passed and signed, presented a petition, praying that the assignees under the joint commission might be ordered to pay him the costs of suing forth and prosecuting those commissions out of the joint estate; and upon that petition coming on to be heard, the Vice Chancellor was of opinion that the petitioner could not correct a former order in respect of costs by a separate petition as to costs only, but that he might have presented a petition for rehearing, as the question was not as to the personal payment of costs, but whether the costs were to be paid out of a particular fund.

V. C.
LINC. INN,
April 10,
1828.

Bankrupt had before his bankruptcy commenced an action, which was subsequently prosecuted by his assignees and failed, and the bankrupt having obtained his certificate was taken in execution for the costs.

Application by the bankrupt for payment of these costs out of the estate refused, on the ground of the bankrupt having by his wilful misrepresentations induced the assignees to pursue the action.

Where bankrupt has acted fairly, he is entitled to this protection.

Ex parte SEAMAN.—In the matter of SEAMAN.

PETITION by the bankrupt, stating that he had commenced an action upon a bill of exchange, pending which he had been declared bankrupt: that his assignees had prosecuted the action in the name of the petitioner, and that upon the trial a verdict was given for the defendant: that the petitioner had obtained his certificate: that execution had issued against the petitioner for the costs of the action, and he had paid them; and prayed that the assignees might be directed to pay such costs to the petitioner out of the estate.

By the affidavits in answer to the petition, circumstances were stated to shew that the bankrupt had induced the assignees to prosecute the action by his misrepresentations of the grounds of it.

The VICE CHANCELLOR.

The assignees are at liberty to proceed in the bankrupt's name, in any action commenced by him before the bankruptcy, and if the action fails in the hands of the assignees, the bankrupt is personally liable to be taken in execution for the costs, notwithstanding his bankruptcy and certificate. This is a hardship at law, against which a bankrupt who acts fairly is entitled to be protected here. The present bankrupt has, however, no claim to that protection; inasmuch as he induced the assignees to pursue this action by a gross and wilful misrepresentation of the facts of the case.

Petition dismissed with costs.

Mr. Montagu for the petition.

Mr. Teed, *contra*.

Ex parte EICKE.—In the matter of HARPER.

L. C.
LINC. INN.
May 24,
1823.

THE petition stated that in December 1822 the petitioner had been committed to the Fleet under an order made on the 15th November 1822, in this matter (a), for his contempt in not paying to the assignees two several sums of £185. 14s. and £19. 6s. 6d., and the costs of that application, which had been taxed: That on the 1st of March 1823 a commission issued against the petitioner, under which he had duly obtained his certificate; and therefore prayed that the petitioner might be discharged.

Party committed under an order in bankruptcy for disobedience to an order for payment of money and costs which were taxed, afterwards becoming bankrupt and obtaining his certificate, ordered to be discharged.

Mr. *Montagu*, for the petitioner, cited the cases mentioned in *Mont. B. L.* 359. note (y).

The LORD CHANCELLOR enquired if the costs mentioned in the petition had been taxed at such time as to make them proveable under the commission; and it was stated that they were taxed before the bankruptcy.

The Lord Chancellor ordered that the bankrupt should be discharged.

(a) *Ante.*

L. C.
LINC. INN.
June 3,
1823.

Ex parte BOWER, RUSHWORTH, and MAW-
SON.—In the matter of PULLAN.

Docket struck
after the Vice
Chancellor had
pronounced an
order for the
superseding of a
commission
against the same
party on the
production of the
necessary con-
sents, but before
the order was
drawn up or the
consents pro-
duced, held re-
gular.

IN December 1822 a commission issued against *Richard Pullan*, under which the petitioners, together with *Mitchell* and *White*, were chosen assignees, but *Mitchell* and *White* did not act. In March 1823 the petitioners presented a petition to supersede, for want of a petitioning creditor's debt and act of bankruptcy; and that petition was served on the petitioning creditors, who on the 6th or 7th of May signified to the solicitor of the petitioners their intention to consent to the superseding of the commission. An application was made to *White*, to know if he would appear on that petition, and his solicitor *Parton* stated that he would instruct counsel for that purpose. At the sitting of the Court on the 10th of May 1823, an application was made to his Honour the Vice Chancellor upon that petition to supersede the commission; and the counsel who had been instructed to consent not being present, his Honour was pleased to order that the commission should be superseded, upon producing the consents of all necessary parties. On the 14th of May the minutes of the order were signed by *Parton* on behalf of *White*. On the 16th of May the order for the supersedeas was signed by the Lord Chancellor, and upon that day delivered to the solicitor of the petitioners, who thereupon applied on behalf of the petitioner *Mawson* to strike a new docket against *Pullan* when he found that a docket had been struck on the 10th of May against *Pullan* by *Parton*, on behalf of *Richard Terrington*, and that a commission thereon had been sealed on the 15th of May. The petitioners submitted, by their petition, that the commission had been sued out by *Parton* irre-

gularly and unfairly, and that a commission ought to issue upon the petition of the petitioner *Mawson*, inasmuch as at the time the docket was struck by *Parton*, and when the commission issued thereon, the order for the supersedeas had not been signed by the Lord Chancellor or Vice Chancellor, nor had it in fact been drawn up; and that the conduct of *Parton* was against good faith, inasmuch as no intimation had been given by him of his intention to strike a docket on behalf of *White*, or of any other person, and that but for the knowledge obtained as solicitor to *White*, he could not have struck such docket.

1822.
—
Ex parte
BOWEN,
RUSHWORTH,
and
MAWSON.
In the matter
of
PULLAN.

Mr. *Shadwell* and Mr. *Montagu* for the petition.

Mr. *Hart* and Mr. *Rose*, *contra*.

The LORD CHANCELLOR said there was nothing in the second docket inconsistent with the established practice of the bankrupt office, and that there was nothing of bad faith in the conduct of *Parton* which should call upon the Court to supersede a commission taken out under such circumstances.

Petition dismissed without costs.

L. C.

June, 1828.

A bankrupt having surrendered has his protection from arrest by the statute, independently of the commissioners certificate.

Bankrupt at large on bail, not in custody, within the meaning of the exception in the sG. 2. c. 30. s. 3.

Ex parte LEIGH.—In the matter of LEIGH.

THIS petition stated that the petitioner surrendered on the 24th of February, at a meeting which was adjourned to the 1st day of April 1823, and that the petitioner received the following certificate from the commissioners.

At the Court, &c.

“ BE it remembered, that the within-named *John Leigh* came and surrendered himself to us, the major part of the commissioners named and authorized in and by a commission of bankruptcy awarded, issued, and now in prosecution against the said *John Leigh*, and submitted to be examined from time to time before us, touching a discovery and disclosure of his estate and effects; but not being prepared to make a full discovery and disclosure of his estate and effects, prayed further time for that purpose, which we have granted him accordingly.”

That on the 12th of March the petitioner was committed to the King's Bench prison in discharge of his bail, at the suit of one *David Simpson*: That on the 1st day of April 1823 the petitioner attended in custody before the commissioners, when the meeting was again adjourned to the 3d of May, and the petitioner received a protection in the following words: “ Be it remembered, that the said *John Leigh* came and surrendered himself to us, but not being prepared, prayed further time, which was granted him accordingly, until the 3d day of May next at this place.”

That on the 19th of April the petitioner was discharged from the custody of the marshal at the suit

of the said *David Simpson*: that between the 12th of March and the 19th of April two detainers had been lodged against the petitioner by *Philip Mose* and *Thomas Claughton*: that the petitioner on the 25th of April last applied to the court of King's Bench to be discharged from custody as to the said detainers: that upon producing to the Court the said certificate, which had been granted to the petitioner on the 24th of February, in which the commissioners had omitted to insert "until the 1st day of April," the day to which the examination had been adjourned, the Court refused to discharge the petitioner; and prayed that he might be discharged, that *Claughton* and *Mose* might be ordered to discharge him, and that they or one of them might pay the costs of the application.

1823.

—
Ex parte
LEIGH.
In the matter
of
LEIGH.

Mr. *Montagu*, for the bankrupt, contended that the freedom from imprisonment did not depend upon the commissioners' protection but upon the clear words of the statute (a), and that the only use of the commissioners' protection was as evidence of the privilege conferred by the statute, and to entitle the bankrupt to the penalty of £5 a day against the officer for the violation of this privilege: that the exception in the statute as to bankrupts in custody at the time of surrender must be construed to apply to those in actual custody, and not to extend to this bankrupt, who at the time of his surrender was out on bail; and though for some purposes to be considered in the custody of his bail, yet if that legal fiction were extended to this case it would nullify the privilege conferred by the statute, as in the generality of cases the trader, the object of a commission, is on bail when the commission issues: that the enactments in the

(a) 5 Geo. 2. c. 30. s. 5.

1823.

Ex parte
LEIGH.
In the matter
of
LEIGH.

bankrupt statutes as to lying in prison upon any arrest, or detention in prison for debt are founded upon the distinction between being actually at liberty and actually in prison: that the law was settled on this point in *Price's* case, 3 *Ves. & B.* 28. 2 *Rose* 22, and *ex parte Goldie*, 1 *Merivale* 176, 2 *Rose* 343.

Mr. *Raithby*, *contra*, urged that the bankrupt was in the eye of the law in the custody of his bail, and that the custody of bail was custody within the exception in the fifth section of the statute; and cited the judgment of Mr. Justice *Le Blanc* in *Johnson's* case, 14 *Ves.* 41., in which he considered the caption of a prisoner who had escaped from gaol similar to the case of bail.

June 7.

The Lord Chancellor said, that it appeared to him that the bankrupt was protected by the statute, but as a contrary opinion had been expressed by the Court of King's Bench, he would, before he finally decided, confer with the Lord Chief Justice on the subject.

June 12.

His Lordship stated, that the Lord Chief Justice had communicated to him to the following effect:—that upon considering the case, and looking into the statute 5 *Geo. 2.* c. 30., and speaking according to the best of his recollection when this matter was before him at chambers in the first instance, and afterwards before the Court, the only question presented was upon the effect of the protection granted by the commissioners, and nothing said as to the protection given by the law, and the operation of the statute distinct from and independent of the protection given by the commissioners; but looking at the fifth section of the statute, he thought that the bankrupt is exempt from arrest for the forty-two days after his actual surrender, and consequently

that he is entitled to be discharged if it be shewn in any manner that he has actually surrendered on a day proved, and that he has been arrested within the forty-two days; and of these facts he thought a certificate signed by the commissioners, mentioning the surrender, and the day of the surrender, would be *prima facie* evidence at the least; perhaps not conclusive, and certainly not the only, though the most easy and convenient evidence: that if the arrest should be after the forty-two days, then he thought that, in order to entitle the bankrupt to his discharge, it would be necessary for him to shew further, that the time for finishing his examination had been duly enlarged by the great seal or by the commissioners, which might be done by the production of the order for enlarging the time, and proving the signature thereto if required, which however is not likely to be required: that for the purpose of subjecting the officer detaining to the penalty, and for that only, he thought the production of a paper signed by the commissioners, or the assignee, is necessary.

1823.

Ex parte
LEIGH.
In the matter
of
LEIGH.

As to the second question, that he thought the custody of bail on an arrest is not custody within the meaning of the statute, at least while the bail permit the principal to be going at large, whatever it might be if they had kept him in their actual custody, until they could take him before a judge to be committed in their own discharge: that before the return of the writ, the case would be still stronger in favour of the bankrupt.

The LORD CHANCELLOR, therefore, ordered the bankrupt to be discharged, and he was discharged accordingly.



CASES

IN

BANKRUPTCY.

Ex parte BATSON.—In the matter of JOHN BELL
and GEORGE BELL.

V. C.
LINC. INN.
March 29,
1822.

THIS was an application by separate creditors of each of the bankrupts for the removal of the assignee, or the appointment of an assignee or inspector to protect the interests of the separate creditors.

Inspector appointed for separate estate where joint creditors had no interest in it.

The separate estates of the respective bankrupts were not nearly sufficient to pay their separate creditors.

The VICE-CHANCELLOR, upon the ground that under the circumstances the joint creditors had no interest in the separate estates, and that the expence would fall on the separate estates, ordered a meeting to be held of the separate creditors of the bankrupts, with liberty at such meeting to appoint an inspector of the separate estates of the bankrupts; and the costs of the application to be paid out of the separate estates.

1822.

V. C.
LINC. INN.
Jan. 17.

Proof or claim
by a creditor
for any debt
operates under
the 49 G. 3.
c. 121. s. 14. as
a relinquish-
ment of an ac-
tion previously
brought for a
distinct de-
mand, but not,
as it seems, of
an action subse-
quently brought
for a distinct
demand.

Ex parte GLOVER. — In the matter of GLOVER.

THIS petition of the bankrupt stated, in substance, that for several years previous to the issuing of the commission the petitioner was in partnership with *William Lloyd*; that the accounts of the partnership were unsettled; that *Lloyd* had lent the petitioner the sum of 240*l.*, for securing the repayment of which, the petitioner had given *Lloyd* his promissory note; that *Lloyd*, at the first public meeting under the commission, which issued on the 25th of April, 1821, applied to prove a considerable debt on a letter of guarantee, given to him by the petitioner for goods supplied to the brothers of the petitioner, who were merchants in Holland, and that the petitioner contended before the commissioners, that *Lloyd*, if all accounts between them were fairly taken, was a considerable debtor to the petitioner's estate; that the commissioners refused to permit *Lloyd* to prove any debt under the commission until the whole of the accounts between him and the petitioner were taken; that a claim was entered upon the proceedings by or on the behalf of *Lloyd* for 3315*l.* 13*s.* 5*d.* on the said letter of guarantee, and *Lloyd* further required to be permitted to prove another sum, as the balance of what he stated to be the general account, independent of the said letter of guarantee; that on the 6th of April, 1821, the petitioner was arrested at the suit of one *Joseph Walsh* for the amount of the aforesaid note of 240*l.*, and that the action was in truth the action of *Lloyd*, that *Walsh* was a mere trustee for him therein, and that *Lloyd* meant to take the petitioner in execution in the said action, notwithstanding he had claimed to prove under the com-

mission, and therefore prayed that *Lloyd* might elect whether he would abide by the claim so made by him and relinquish the action at law, or abide by his proceedings at law and relinquish his claim; and that if *Lloyd* should elect to take the benefit of the said commission, that he might be restrained from further proceeding in the action, and be directed to pay the petitioner's costs of defending the same subsequent to the date of his said claim, or if he should elect to proceed at law against the petitioner, then that his claim might be expunged from the proceedings, and that he might be restrained from claiming any benefit under the commission.

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It appeared to be the result of the evidence that *Walsh's* action was in fact the action of *Lloyd*.

Mr. Rose for the petitioner.

Mr. Montagu, *contra*.

Ex parte Dickson, 1 Rose, 98.; *Ex parte Hardenberg*, 1 Rose, 204.; *Watson v. Meder*, 1 Barn. & Ald. 121.; *Ex parte Woolley*, 2 Ves. & B. 253. 1 Rose, 394. were cited.

The VICE-CHANCELLOR considered that under the 40 G. 3. c. 121. s. 14. the claim by *Lloyd* under the commission was a relinquishment of the action; that the statute did not appear to apply to actions for distinct demands brought subsequent to proof or claim; that a distinct demand, was a demand of a distinct nature, as of *indebitatus assumpsit* and bond.

It was ordered that the proceedings at law should be stayed, *Lloyd* having elected to proceed under the com-

1822. mission, and that a suggestion of that fact be entered on
 — the roll at law, and that *Lloyd* should pay the costs of
Ex parte the application. (a)
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 In the matter
 of
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L. C. *Ex parte* BARCLAY, and *ex parte* KNIGHT and
 LINC. INN. Others.—In the matter of BRANDER and BAR-
 Feb. 9. CLAY.

Application by
 a creditor hold-
 ing property of
 the bankrupt,
 the title to re-
 tain which was
 disputed, to
 take it at a
 fixed value, and
 to prove for the
 difference, and
 to vote in the
 choice of as-
 signees.

THE petition of Sir *Robert Barclay*, the father of the bankrupt *Barclay*, stated that the petitioner was a creditor of *Brander* and *Barclay*, to the amount of 18,712*l.*, after giving credit for certain *India* bonds and household furniture, made over to the petitioner previously to the bankruptcy; that upon applying to prove such debt, the commissioners were of opinion that the petitioner was entitled to prove the same, but required him to give up his interest in the furniture and *India* bonds; that in a letter from *John Barclay* to the petitioner, bearing date the 26th of January, 1820, the state of the account between the petitioner and the bankrupts was correctly stated as follows: "I have charged your account with the money set aside for you, about 2450*l.*, and which is now in *India* bonds in the hands of Mr. *Fletcher*, and also with the value of Mr. *Brander's* furniture, 1055*l.* which is made over to you, the real value is about 1500*l.*, the furniture will be sold as soon as possible; after charging your account with these items, and allowing you interest on your account to this time, there will be due to you about 18,700*l.*, the account current itself shall be sent to you in a few days:" that the petitioner's debt, without deducting the value of the

(a) See *Harley v. Greenwood*, 5 Barn. & Ald. 95.

India bonds and furniture would have amounted to 22,217*l.*; that the furniture produced only 661*l.* 9*s.* 6.; that the petitioner expressed his willingness, in the event of his being found not entitled to retain such *India* bonds and furniture, to give up the same, and tendered his proof accordingly upon such undertaking: that the commissioners considered the petitioner's proposal as reasonable, but were of opinion that they had not jurisdiction to admit the proof upon those terms, without application to the court, and had therefore adjourned the choice of assignees to enable the petitioner to make such application. The petition, therefore, prayed, that the petitioner might be at liberty to prove the said sum of 18,712*l.* as the amount of his debt, after deducting the value of the bonds and furniture; the petitioner undertaking that in case, upon any petition which might be presented, the petitioner should be held not entitled to such bonds and furniture, then to submit to any order for delivering up the same, or to account for the value thereof as the court might direct; the petitioner claiming, in such event, to have his proof increased accordingly.

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A petition was afterwards presented by *John Knight* and others, creditors of the bankrupts, against the claim of *Sir Robert Barclay* and the postponement of the choice of assignees, stating, that on the 5th day of February, 1820, a commission had issued against *Brander* and *Barclay*, and that it was a concerted commission, that, in order to prefer the interest of *Sir Robert Barclay*, and to secure the choice of friendly assignees, the bankrupts had caused certain *India* bonds, to the amount of 2554*l.*, together with certain furniture, to be fraudulently carried to the credit of *Sir Robert Barclay*; and as evidence thereof, the petition stated, the said letter, written by *Barclay*, the bankrupt, to *Sir Robert Barclay*, bearing date the 26th of January, 1820, and another

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letter dated the 15th January, 1820, from the bankrupt to Sir *Robert Barclay*, from which the following is an extract: "I am of opinion the *Gazette* is the only effectual remedy to clear myself of my present engagements, and probably we may appear there next week; a form of affidavit will be sent to you for the proof of your debt, and a power of attorney for your signature, authorising (I propose) Mr. *Fletcher* to vote in the nomination of assignees, and afterwards to sign the certificate in your behalf. This will be all the trouble to which you will be exposed." This petition further stated, that in consequence of the exertions of the bankrupt and Sir *Robert Barclay* friendly assignees had been secured; that in November, 1821, such commission had been superseded for concert, and in the same month a new commission had issued upon the petition of the petitioners; that the same exertions had been made under the present commission to secure the choice of assignees, and Sir *Robert Barclay* had personally assisted his son in his canvass for the same; that Sir *Robert Barclay's* attempt to prove a joint debt of 18,712*l.* had been opposed by the petitioners, upon the ground that the money brought into the partnership was upon a breach of trust by *Barclay*, of which *Brander* had no notice, in evidence whereof certain letters were produced, in one of which, bearing date the 15th of January, 1821, *John Barclay* wrote as follows: "My present calamity came upon me so suddenly that I had only time to call *Brander* to town before we were obliged to stop. Many months ago, before *Ruxton's* arrival at Rio was known, and we were much pressed for remittances, I sold, at different periods, 26,000*l.* of your 3½ per cent annuities, and carried the proceeds to a separate account, intending to replace the same quantity of stock, and to pay the usual quantity of dividends until it was done; our situation and prospects at that time were undoubted, and I

consider that had I applied to you for assistance at the time, you would have granted it, satisfied that your property was secured in the prosperity we then enjoyed; but knowing your anxious disposition, I feared I might disturb your peace of mind, and for that reason and that alone I did it without your knowledge, and no person but you and I know the circumstances I have now stated. I have made over some property to a friend, to be paid to you after our certificate is signed, but you will still be a creditor for about 20,000." Further correspondence between *Barclay*, the bankrupt, and *Sir Robert Barclay*, together with the examinations of the bankrupts under the commission, was adduced to show that *Brander* did not know that the stock was sold under circumstances constituting a breach of trust. This petition further stated, that the petitioners and other creditors, to the amount of 10,900*l.*, were at the meeting for the choice of assignees prepared to proceed to the choice, but were prevented from so doing by the determination of the commissioners to adjourn the same, in order to permit *Sir Robert Barclay* to vote; and therefore prayed, that the commissioners might forthwith proceed to the choice of assignees, that there might be no deviation from the regular course to enable *Sir Robert Barclay* to vote in such choice, and that he might not prove his said debt as a joint debt, or vote in the choice of assignees thereupon, and that the costs of the application might be paid out of the bankrupts' estate.

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The two petitions were heard together.

Mr. Agar and *Mr. Montagu* against the claim of *Sir Robert Barclay*.

This is an application on the part of *Sir Robert Barclay*, to deviate from the established rule, calling

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upon the court to apportion a debt where the security arose, not *ex contractu* but *ex delicto*: and that too, where the application is not made at the usual time, before the choice of assignees, but after the time appointed for the choice. The cases on this subject are of two classes; — first, where the creditor as mortgagee, has an undisputed pledge given before the bankruptcy; and, secondly, where it is given after or upon the eve of the bankruptcy, and under circumstances necessarily the subject of contest with the general body of creditors. To the first class, may be referred the cases *Ex parte Nunn* (a), and *Ex parte Greenwood*. (b) These cases were decided upon the principle, that a creditor having a security and a large debt ought not, in justice, to be deprived of his right of voting in the choice of assignees. Even in these cases the Court found great difficulty in knowing how to deal with the pledges so as to prevent any unfair advantage. The next class of cases is, where the creditor claims by virtue of the security, but adversely to the rest of the creditors. The cases are *Ex parte Detastet*, 1 Rose, 325, *Ex parte Smith*, 2 Rose, 64. 1 V.&B. 518., and *Ex parte Hopley*, 1 J.&W. 423. The principle to be drawn from these decisions is, that the Chancellor will, under certain circumstances, dispense with the rule as to the sale of the security, and permit the creditor to fix it at a maximum, and prove for the difference; but in allowing this, the Court will attend strictly and cautiously to the circumstances of each case. The property being abroad, or liable to be depreciated by the fall of the markets, or the security being inconsiderable compared with the amount of the debt, are considerations to influence the Court in the exercise of

(a) 1 Rose, 322.

(b) Buck, 523.

such discretion. It was soon seen that the rule in *Ex parte Detastet* must lead to serious evils; by enabling a creditor claiming adversely to the other creditors, to use the purse of the estate to contend against the estate: and the mischief was sought to be remedied in *Ex parte Smith*, which came before the Court in May 1813; *Detastet's* case having been decided in February 1813; and in *Ex parte Smith* your Lordship says, "The practice has been long established in bankruptcy, not to suffer a creditor holding a security to prove unless he will give up the security, or the value has been ascertained by a sale of it. The reason is obvious. Till the debt has been reduced by the proceeds, it is impossible, accurately, to say what the actual amount of it is: and with this further consideration, that in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the creditors to sustain his disputed title in a situation of predominant advantage."

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If then the jurisdiction of permitting proof of a debt, deducting the value of a security unsold, even where there is clear undoubted evidence of a pledge, be thus sparingly exercised, and with reference to the particular circumstances of each case, *a fortiori*, the rule applies to the case of a disputed transfer, under circumstances indicating a voluntary preference. The choice ought not to have been adjourned for the purpose of allowing such a debt to influence the choice in a case where the other creditors are to so large an amount, leaving the estate in the meantime without protection. In *Ex parte Butterfill*, 1 Rose, 192, your Lordship says, that though not an universal rule, it is almost an universal rule, that the appointment of assignees will not be disturbed when chosen by those who can make immediate proof, al-

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though those who may not have been prepared so to do would have turned the scale.

Mr. Hart and Mr. Rose.

The commissioners were right in adjourning the choice of assignees. The legislature has declared that the choice should be decided by the majority in value of the creditors; and it would be inconsistent with the spirit of the law to proceed to a choice without permitting a creditor to so large an amount as Sir Robert Barclay, to avail himself of his rights. The existence and amount of the debt are not disputed: a question has been made on the circumstances whether it is a joint or separate debt, but admitting that the debt of Sir Robert Barclay was founded on a breach of trust committed by Barclay alone without the knowledge of Brander, still as the money was applied to the purposes of the partnership, there can be no reason why the estate benefited should not be subject to the proof. With respect to creditors possessing pledges securing part of their debts, it is now the ordinary rule, that the party having the pledges is entitled to ask the Court to appropriate the pledge for a certain amount, and if on sale it is found to exceed that sum, the excess goes to the estate. The reason of such practice is obvious; to prevent the hardship of excluding perhaps the largest creditor, as in the present case, from exercising his right of voting in the choice, merely because he has a deposit of unascertained value, however disproportioned that deposit may be to the amount of his debt. There is nothing in the present case to induce the Court to deviate from that course. In *Detaset's* case your Lordship, with all the circumstances which attended that case, thought it fair and reasonable that a creditor having a great preponderance of debt, for which he held a very disputable pledge, should be at liberty to

fix the extent of what he could claim upon his pledge and to prove for the balance, leaving it as a future question whether he could or could not retain that pledge. No distinction can be made between this case and that of *Detastet*; his disputed title to the bills of the value of £5,000*l.*, received just on the eve of the bankruptcy, did not induce the Court to prevent his retaining the securities and proving for the difference.

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The application in the case of *Detastet* was long before the choice of assignees; and the Court put it upon *Detastet* to give security to deliver up the property, when he proved his debt, if the commissioners should call upon him so to do. There it was at least a questionable point, whether he could or could not hold the security; and it was determined that he could; while on the contrary, in the present case, it appears clear that it is a preference which cannot be sustained. In *ex parte Greenwood*, the case of the deposit of hops, there was no doubt as to the validity of the deposit; and where it is a valid undisputed pledge, much of the difficulty is cleared away; the order in *ex parte Greenwood* was founded on an order in a case of a similar nature, which I penned myself, and which goes a good way ultimately to do justice. In a case of preference so plain as this, can the court do any thing by way of beneficial order to a party struggling to retain property of the bankrupt: I cannot understand why it has been treated by the commissioners as a pledge: according to the circumstances represented in the petitions, I must consider it as property made over in reduction of the debt; and in ordinary cases, the rule is to prove for the debt minus the value of the property delivered over. The fact of preference is clear. The debtor, on the 15th of January, writes that he must go

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into the Gazette, and wishing to give the creditor all the advantage he can, sends him the form of affidavits, upon which proofs are to be made under the bankruptcy, and during the very time in which the affidavits are on the way between London and Edinburgh, the India bonds and furniture are made over. Even if it had been a pledge, considering the date and circumstances of the transfer, it would not have been valid. The order I shall make must be, that the choice of assignees be proceeded with after the commissioners have determined upon the proof, and that Sir *Robert Barclay* be at liberty to go before the commissioners and tender such proof as he shall be advised, without any order as to apportionment. With respect to the fact of the debt being a joint or separate debt, I have no right to give an opinion till it be upon the proceedings proved as one or the other. I do not understand the commissioners hitherto to have come to any conclusion, and it is competent for them, therefore, to re-consider the whole case. As to the postponement of the choice of assignees, without delivering any opinion as to its occurrence in the present case, I am quite ready to say, that, in general, the commissioners ought to determine to the best of their judgment, and go on to the choice of assignees, unless a petition against it be presented.

The order was, that a meeting of the commissioners should be forthwith called for the proof of debts, and for the choice of an assignee or assignees; and that the petitioner, Sir *Robert Barclay*, should be at liberty at such meeting to tender to the commissioners such proof of his debt as he should be advised, and that the commissioners should receive such tender accordingly, and determine thereon, and after such determination, or in the event of no proof being then tendered to the com-

missioners by the said petitioner, that the creditors present, and entitled to vote, should proceed to the choice: as to both the petitions further directions and costs were reserved.

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Ex parte DAYRIE.—In the matter of MARTELLY and DAYRIE.

V. C.
LINC. INN.
March,
1823.

THE assignee, without the knowledge of *Dayrie*, presented a petition, in the usual form, to enlarge the time for the last examination of both the bankrupts for twenty-eight days, on the ground that *Martelly* was out of the kingdom; and an order was made, *ex parte*, to enlarge the time for the last examination of both the bankrupts, as prayed.

It is irregular in the assignees to obtain an *ex parte* order to enlarge the time for the last examination of a bankrupt who is ready to attend.

This was a petition by the bankrupt *Dayrie* to discharge so much of the order as affected *Dayrie*, and that the Court would deal with the costs of the application as it might think proper.

Mr. *Heald* for the petition, contended, that although the assignees might make such an application in respect of *Martelly*, who was out of the kingdom, and not likely to return time enough to surrender and pass his last examination, it was not competent to him to do so in respect of *Dayrie*, who was prepared to finish his examination; and submitted that *Dayrie* ought to be paid the costs of this application.

Mr. *Montagu* for the assignee, stated, that the object in making the application for enlargement was to save

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the expense of the meeting, when it was evident from the extent and intricacy of the accounts, as in this case, that the assignee could not have sufficient opportunity to examine them with effect previously to the day of meeting: that the application was considered so much of course that it was made at the office of the secretary of bankrupts, upon a short petition, and the order drawn up in the office without mentioning it in court; and that the application was made either in the name of the assignee or of the bankrupt, and always *ex parte*.

The VICE-CHANCELLOR was of opinion that the order should be discharged, and considered such an *ex parte* order was regular only when the party, whose examination is delayed, is out of the kingdom; that where the bankrupt is present and it appears prudent to postpone the examination, the commissioners had at the time a power to adjourn it, and that the delay might be an unnecessary prejudice to the bankrupt.

So much of the order as respected *Dayrie* was discharged, and his costs were ordered to be paid out of the estate.

V. C.
 January,
 1822.

Ex parte **BELL** and Others, the Assignees, — In the
 matter of **WEBB.**

Voluntary settlement by bankrupt, though void against his creditors, subsists for all other purposes.

WEBB the bankrupt was entitled to certain lands and premises, in fee tail in remainder, expectant on the death of *Ann Pearce* and the failure of her issue, and on the death of *John Webb*, the father of the bankrupt.

By a settlement made by the bankrupt after his marriage, in March, 1812, wherein it was recited that he had then living four sons, the said lands and premises were conveyed to trustees, in trust for the bankrupt and his assigns, during his life, and after the death of the bankrupt, in trust by mortgage or sale of the said lands and premises, or a competent part thereof, or by the rents and profits thereof, to raise the sum of 2000*l.* for the wife and children, other than an eldest or only son of the said bankrupt, in such shares and proportions as the bankrupt should appoint; and in default of appointment, in trust for his wife and children, other than an eldest or only son, and subject to that charge, in trust for the benefit of the said four sons, and every future son and their issue as therein mentioned, with the ultimate remainder to the bankrupt in fee.

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John Webb, the father, died in January 1813, and *Ann Pearce* died without issue in May, 1815; whereupon the bankrupt became entitled to the said lands and premises.

This commission issued in 1817, and the petitioners, as assignees, shortly after the execution to them of the bargain and sale of the bankrupt's real estate, filed a bill in the Court of Chancery against the trustees of the settlement, the bankrupt and his wife and the children of the marriage, praying that the settlement might be declared void, as against the petitioners, and that the trustees and other proper parties might make a conveyance of the premises to the petitioners, as such assignees; and in May, 1819, a decree was made in that suit, declaring that the settlement, being executed for a nominal consideration only and voluntarily, was void, as against

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the creditors of the bankrupt, within the meaning of the statute 1 Jac.1. c.15., the bankrupt being, at the execution thereof, a trader, within the meaning of the bankrupt statutes, and that the trustees stood seised of the said premises, in trust for the petitioners.

The petitioners proceeded to a sale of the premises, and the petition stated, that the purchasers refused to complete, unless the bankrupt's wife released her title to dower out of the premises, and that the bankrupt's wife refused to release it, unless she was allowed and paid a compensation for so doing, and prayed a reference to the Master, to enquire, whether, in the event of the wife surviving, she would be dowable out of the said premises, and if so, whether the sum of 500*l.* was a proper compensation out of the surplus of the purchase-money, after payment of the creditors of the bankrupt, in respect of her claim to dower.

Mr. *Whitmarsh*, for the petitioners.

Mr. *Wray*, for the bankrupt's wife: Mr. *Tinney*, Mr. *Hayter*, and Mr. *Latham*, for other parties.

It was insisted, that the voluntary settlement was wholly void, and that the wife was therefore entitled to dower.

The VICE-CHANCELLOR held, that the wife, never having been entitled to dower, by reason that the settlement was made before the husband was seised of an estate in possession, could not now claim dower against the creditors by force of the bankruptcy; that the voluntary settlement was void only against the creditors, and subsisted for the wife and children, and that any surplus

of the bankrupt's estate would be bound by the trusts of the settlement. (a)

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It was declared, that the wife was not entitled to dower; and the costs of all parties were ordered to be paid out of the bankrupt's estate.

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Ex parte BOYD. — In the matter of BOYD, BENFIELD, and DRUMMOND.

LINC. INN.
April 1823.
June 1824.

IN 1794, Count *Schulenberg* caused to be remitted to the petitioner, *Walter Boyd*, and his partners, *Paul Benfield* and *James Drummond*, as agents in England for procuring a loan for the Emperor of Germany, the sum of 3300*l.*, to be invested in imperial stock and annuities in the name of the said Count *Schulenberg*. In 1799, Count *Schulenberg* recovered judgment by default against Messrs. *Boyd*, *Benfield*, and *Drummond*, for the sum of 3558*l.*, for damages and costs in an action brought for not transferring the stock and annuities pursuant to their undertaking (b). In 1800, a commission issued against the petitioner and his partners, under which Count *Schulenberg* proved the amount of his judgment.

Creditors under a commission entitled to interest out of a surplus only where interest accrues due upon contract express or implied.

(a) *Assignees of Gardiner v. Shannon*, 2 Sch. & Lef. 228. *Walker v. Burrows*, 1 Atk. 93. 21 Jac. 1. c. 19, s. 12.

(b) The counts in the declaration were for not transferring

the imperial stock and annuities, and for not investing the money remitted in the imperial stock and annuities, pursuant to their undertaking, and the money counts.

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 ———
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In 1822, twenty shillings in the pound was paid under the commission, and there was a large surplus. The sum of 3558*l.*, the amount of the judgment-debt, was tendered to Count *Schulenberg*, on his delivering up the debentures of the imperial loan which were in his possession, but he refused to deliver them up unless interest were paid upon his debt from the date of the judgment; and by mutual agreement the said sum was invested in exchequer bills. The petition prayed that the petitioner might be declared entitled to the debentures; that Count *Schulenberg* might be ordered to deliver the same up to the petitioner; that the exchequer bills might be delivered to Count *Schulenberg*; or that the same might be sold and the produce brought into Court for his benefit; and that he might be declared not to be entitled to interest on the said sum of 3558*l.* The amount of the interest claimed by Count *Schulenberg*, as well as of every other claim upon the petitioner, having been paid by him into court and invested in 3 per cent. bank annuities in the name of the accountant-general (*a*), in August 1822, the commission, so far as it respected the petitioner (*b*), was superseded. The debentures were, after the petition was presented, deposited in the custody of the deputy secretary of bankrupts.

Mr. *Fonblanque*, Mr. *Bell*, and Mr. *Montagu* for the petition.

(*a*) See *ex parte Rooke*, 1 Atk. 244.

(*b*) The 3 G. 4. c. 74. enables the Lord Chancellor to supersede a joint commission as to

one or more of the bankrupts, without prejudice to the validity of the commission as to the other bankrupts.

The single question is, whether Count *Schulenberg*, having made this proof upon his judgment, is entitled to interest. Interest is only payable out of the surplus of a bankrupt's estate, when the debt in its nature carries interest upon contract express or implied: not upon a judgment where interest is given as damages. Here, judgment is recovered as a compensation in damages on a judgment not in its nature originally carrying interest; an action, indeed, may be brought upon a judgment, and interest recovered in the shape of damages upon the judgment (a); but this Court could not, in equity or in bankruptcy, give interest upon the judgment. This question was much discussed in *Clarke v. Seton*, 6 *Ves.* 411, that was the case of a bond on which judgment had been recovered, and it was contended, that though courts of equity do not allow interest beyond the penalty, yet that judgment having been obtained upon the bond, interest might under special circumstances be given, but it was refused: in that case, *Creuse v. Hunter*, 4 *Bro. C. C.* 157. 316. was referred to, in which it is stated that the late Lord Chancellor was clearly of opinion, that where the debt in its original nature did not carry interest, a judgment obtained upon it could not carry interest. *Deschamps v. Vanneck*, 2 *Ves.* 716., *Sharpe v. Earl of Scarborough*, 3 *Ves.* 557., and *Mackworth v. Thomas*, 5 *Ves.* 329., are there also cited, and together with a series of late decisions confirm this doctrine. In *Nelson v. Sheridan* (b), the Plaintiff recovered judgment in an action on a bill of exchange, on which judgment he brought an action of debt and obtained judgment by default; it was moved to be referred to the Master to compute interest on the judgment, and it was

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(a) 7 *T. R.* 446. 3 *T. R.* 595. 1 *East*, 436. (b) 8 *T. R.* 595.

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stated by affidavit that the sum of 18*l.* was due for interest from the time of signing the first judgment; but it was refused, on the ground, that it was a question of damage to be ascertained by a jury. There is no case where a jury having taken into consideration the loss of interest as well as principal, the Plaintiff has been held entitled in a court of equity to subsequent interest upon that judgment. Although the nature of the case be such that a second action might be brought upon the judgment, and the Judge would direct the jury to consider the interest for the detention of the debt in the nature of damages, yet a court of equity would not permit a computation of interest: *à fortiori*, where the damages are to be considered as a debt to be proved under a commission. *Cameron v. Smith*, 2 *Barn. & Ald.* 305. decides, that interest cannot be computed upon a bill of exchange, so as to constitute a good petitioning creditor's debt, where interest is not expressly reserved upon the face of the bill. In that case *Abbott C. J.* recognises the distinction taken by Lord *Hardwicke* in *Ex parte Marlur*, 1 *Atk.* 151. between cases where interest is reserved upon the face of the bill; and where not; and the reason given in *Ex parte Marlur* is, that when interest is not expressed in the body of the note, the jury do not give the Plaintiff interest but by way of damages only: and therefore, as commissioners of bankrupts cannot award damages, they cannot allow such creditors to prove interest due upon the note. In *Bromley v. Goodere*, 1 *Atk.* 75., which established the doctrine upon the subject, Lord *Hardwicke* took great pains in drawing up the distinctions between debts that carry interest and debts that do not carry interest; and that case has ever since been followed, *Ex parte Mills*, 2 *Ves.* 295. In *Ex parte Greenway*, *Buck.* 413. the Lord Chancellor says, "I certainly never till lately understood the ground of Lord *Hard-*

wick's decision, than whom there never was a better common lawyer : for my difficulty always was, how that could be damages which a Judge could give : but during the last sessions there was a very learned argument before the House of Lords (a), in which it was clearly made out by the authority of cases of great antiquity, that a Judge, where it is a matter of mere computation, may give interest, yet such interest is of the nature of damages." The principal recent cases upon this point are, *Ex parte Cocks*, 1 *Rose*, 317.; *Ex parte Lloyd*, 17 *Ves.* 246; *Ex parte Williams*, 1 *Rose*, 399: shewing that interest is not payable even out of a surplus of a bankrupt's estate except on debts carrying interest by contract. It seems to have been considered, that the holding of the debentures gave a claim to interest. The Court could not hold the debentures and also the benefit of his proof.

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Mr. Horne and Mr. Merivale for Count *Schulenberg*.

There are two questions, — first, whether upon the original nature of the debt Count *Schulenberg* be entitled to interest? Secondly, whether, without paying interest upon such debt Mr. *Boyd* be entitled to an order of the Court to have the debentures delivered up to him?

Admitting that a bankrupt's surplus is only liable for interest on debts which in bankruptcy carry interest, the question is, what debts bear interest in the case of a surplus, as between the creditors and a solvent debtor, not as between the creditors themselves; whether a bankrupt, in point of justice, ought to have any thing

(a) *Eyre v Bank of England*, 1 *Bligh*, 582., and the note to that case, 587.

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delivered over to him but the surplus of his estate, after he has paid every demand which, if a solvent man from the commencement, he might have been compelled to pay; in *Ex parte Cocks*, the only case of a surplus, an action had been brought, but no judgment obtained. In the present case, a judgment has been obtained, and it may only be necessary to establish that the debt upon which the judgment was founded, was one which would carry interest. This judgment was obtained by default, and it was at the option therefore of Count *Schulenberg* to apply such judgment to any other of the six counts in the declaration as well as the one charging non-investment of stock.

The case of *Ex parte Deey*, 2 Ball & Bea. 77., which has not been mentioned, is an authority directly in point. In that, as well as the present case, the question was, whether creditors by judgment are entitled to interest out of a surplus from the date of the commission. The commissioners had decided that the judgment creditors had no claim to interest; but the Lord Chancellor was of opinion, that the judgment creditors were entitled to interest from the date of the commission to the hour of their receipt of their principal debts. There is no case upon a judgment controverting this decision in *Ireland*. All the cases cited are not only not upon judgments, but with the exception of one, are cases of direct proof. Interest may be due in bankruptcy by contract express or implied, and custom or the declarations of the parties may raise evidence of contract. In *Ex parte Champion*, 3 B. C. C. 436., there being a surplus of the bankrupt's estate to be divided amongst creditors, interest was allowed after a certain credit; the course of trade being considered as evidence of the contract, *Ex parte Hankey*, 3 Bro. 504. bears upon the same point. In this

case interest was paid by Mr. *Boyd* up to November 1797; sufficient evidence without these authorities of a contract for interest à priori, and that is confirmed by Mr. *Boyd's* offer to pay ten shillings in the pound upon the interest. Is the judgment to deprive the Count, then, of interest, and to place him in a worse situation than if it had stood on the previously implied contract?

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What equity has Mr. *Boyd* to have the debentures delivered up to him until he pays the interest. We have those securities rightfully in our hands, and they may be serviceable to the Count in enabling him by them to work out his interest from the Austrian government. If Mr. *Boyd* is to have them, he may obtain from the Austrian government more than he pays to the Count.

Mr. *Fonblanque* in reply.

The case, *Ex parte Deey*, only shews that a creditor by bond will be entitled to interest in case of a surplus beyond the commission, and though it is true that the order was, that the judgment creditors were entitled to interest from the date of the commission, yet it obviously applies only to judgment creditors upon debts carrying interest, and upon which interest had been proved up to the commission, since it directs the payment of the additional interest out of the surplus from the date of the commission. In the administration of assets in this court, upon an order or a report, interest is only paid on debts originally carrying interest; a debt acquires all the character which the report gives to it, but upon further directions, the master is directed only to continue the computation of interest on debts carrying interest. Whether this debt originally carried interest

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or not, it would not now bear interest, because the proof is upon the judgment for non-performance of the contract, not upon the debt.

The VICE-CHANCELLOR.

April 1823.

The prayer of this petition is opposed on two grounds; first, that Count *Schulenberg* is entitled to receive not only the sum of 3558*l.* proved under the commission, but also interest at 5 per cent. upon that sum up to the day of payment; and, secondly, that if the Court should be of opinion that he is not entitled to interest, then that he ought not to be ordered to deliver up these debentures, by means of which he may be able to work out the payment of that interest, to which he alleges that in equity he is entitled.

The last of these points seems already satisfactorily settled. It appears that the contract upon which Count *Schulenberg* recovered the judgment that entitled him to the proof of 3558*l.*, was a contract, that if Mr. *Boyd* should transfer the amount of the stock and annuities in the imperial loan, Count *Schulenberg* would deliver up such debentures. Count *Schulenberg* having obtained by judgment the effect of that contract, (for the judgment gave him, in truth, the value of the imperial stock and annuities :) and having proved the amount of the judgment under the commission, he is become bound to deliver up the securities upon which such proof was founded: he cannot hold both the thing purchased and the price of the purchase, whether he be entitled to the sum recovered only, or to that sum with interest. The commissioners having omitted to require the delivery of the securities, he might still have a right of election whether he would take the benefit of the

commission and deliver up the debentures, or retain them and abandon his proof: *Count Schulenberg*, however, has declined to present a petition for the purpose of expunging the proof.

1828.

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of
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The material question then in this case is, whether *Count Schulenberg* be entitled to interest upon the debt he has proved; and this is a question so surrounded by authorities, that I am not called upon to give the reasoning upon which my judgment proceeds. I consider those authorities so cogent, that my judgment is actually bound by them. The only question is, whether there can be any doubt upon those authorities: I agree that the cases before *Ex parte Cocks* can only furnish general principles. In that case the question, as in the present, was, whether interest was claimable against the surplus of a bankrupt's estate only by reason of a contract expressed or implied; or whether, where on a proceeding at law, a creditor might be entitled to the value of that interest, not by computation, as interest due upon a contract, but as damages to be rendered due to him by the verdict of a jury for the non-performance of a contract, he is entitled to be paid such interest as a jury would give as damages. *Ex parte Cocks* was not, indeed, the case of a creditor who had proved on the amount of a judgment, but of a creditor who had proved on a promissory note payable on demand, which, upon this point, is in legal effect the same. If an action had been brought upon the judgment, the Judge would have directed the jury to consider the amount of interest upon the judgment entered up, and to find a verdict for that in the shape of damages. So, if an action had been brought upon the note in *Ex parte Cocks*, interest would have been given from the time of the demand, not as compensation in the name of interest, but by way of damages; on principle, there-

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fore, there is no difference between an action brought upon a judgment, and an action upon a promissory note payable on demand: and in that case, upon the revision of all the authorities, the Lord Chancellor came to that conclusion to which I should have come in this case without the aid of that authority; that in the administration of a bankrupt's effects, no creditor can be entitled to interest except upon contract.

Ex parte Deey (a), has been cited as inconsistent with *Ex parte Cocks*, but I do not think it applicable to the present case. The only judgment-debt which is distinctly stated there is a judgment upon a bond which carries interest by express contract, and there the computation was upon the bond and not upon the judgment. I think, therefore, that Mr. *Boyd* is entitled to the benefit of the prayer of his petition.

It was ordered, that Count *Schulenberg* should deliver up the debentures and bonds to the petitioner; that the exchequer bills should be sold, and out of the produce the sum of 3558*l.* 7*s.* should be paid into the bank, and invested in the name of the accountant-general, with liberty for Count *Schulenberg* to apply for payment thereof; and it was declared that Count *Schulenberg* was not entitled to interest on the said sum of 3558*l.* 7*s.*

Against this order Count *Schulenberg* appealed.

Mr. *Hart*, Mr. *Shadwell*, Mr. *Merivale*, and Mr. *Millar*, for the appellant.

(a) 3 Ba. & Bea. 77.

Mr. Ponblanque, Mr. Horne, and Mr. Montagu, for
Mr. Boyd.

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June 12,
1824.

The LORD CHANCELLOR.

The first question which this case presents for decision is this, where there is a surplus in bankruptcy, after payment of all the sums proved under the commission, how that surplus is to be disposed of? I have always understood that this question was settled by Lord *Hardwicke*, in Sir *Stephen Evance's* case (a), that creditors by bonds, bills, and notes bearing interest, were entitled to interest out of a surplus, to the time of their receiving full satisfaction, but not on bonds beyond the penalties; and that upon debts not agreed to carry interest, interest was not proveable in bankruptcy, even in case of a surplus: a rule, however, applying differently to bonds and notes, and, in some cases, more beneficially as to notes than bonds; for if a proof is made upon a bond, and the principal and interest exceed the penalty, the proof cannot be carried beyond the penalty. There is only one case that I recollect in the books, where this Court has allowed the demand to go beyond the penalty, and that is, where the Court has, by an injunction improperly granted, prevented the obligee from possessing the principal; but upon a note bearing interest upon the face of it, the creditor would be entitled to all his interest, though exceeding what would have been the penalty, had it been a bond instead of a note. Lord *Hardwicke* settled the rule in the case to which I have alluded, on the ground, that at law the interest is given in the nature of damages. I remember very frequently to have felt great difficulty in my own mind, to understand how

(a) *Bromley v. Goodere*, 1 Atk. 80.

1824. damages could be so given by a court of law, though
 ——— that they are so given in many cases, and not by a jury,
Ex parte is very clear; for it happens constantly, that upon an
 BORD. affirmance of a judgment on writ of error, where the
 In the matter action has been on a promissory note, the Court calcu-
 of lates the interest in the shape of damages, from the time
 BORD. of the judgment to the affirmance; — but my mind has
 been set right as to this point, upon a learned argument
 addressed to the House of Lords, in a case (a) of that
 description, where it was made out by several cases,
 that where it was mere matter of computation, and the
 Court could state what the damages should be, the Court
 itself could give them; and it was in truth only avoid-
 ing the circuitry of moving for a new trial. I appre-
 hend, that from the time of Lord *Hardwicke's* decision
 to the present time, the rule has been, that interest is
 proveable by force of the contract, either appearing upon
 the face of the instrument, or arising out of circum-
 stances evidencing that there was that contract; and if
 I do not mistake the import of the cases, they have gone
 to this length, that where there was not originally a con-
 tract for interest, but by a subsequent arrangement a
 contract is made for the payment of interest, even if at
 the time of proof made the parties had not understood
 the effect of their own contract, and had proved only
 for the principal, yet if they shewed there was such a
 contract, the Court has allowed them interest out of the
 surplus. These cases are not shaken, but on the con-
 trary rather confirmed, by *Ex parte Champion* (b) and
Ex parte Hankey (c). In *Ex parte Champion*, Lord *Thur-*
low was very unwilling to admit, what the merchants at

(a) *Eyre v. Bank of England*, (b) 5 B. C. C. 456.
 1 *Bligh*. 582. (c) 5 Bro. C. C. 504.

Guildhall would very readily have admitted, that the custom was sufficient to authorise the Court to say there was such a contract; but he puts his judgment upon this, that accounts had been settled from time to time in such a manner that the accounts were evidence that there was a contract for interest, which he thought as much established by the settlement of the accounts, as if expressed upon the face of a written instrument. *Ex parte Hankey* was a slighter case, for there Lord *Thurlow* was of opinion, that interest having been paid, he was at liberty to infer a contract. I do not enter into the question, whether all judges would have been of the opinion which Lord *Thurlow* held on that case, but his judgment proceeds upon the principle that his mind was satisfied there was such a contract for interest; and the decision proceeding upon his mind being so satisfied, the consequence is, that instead of that decision being a departure from the rule, as far as his judgment is regarded, it is an affirmance of it. — Such being the rule established in bankruptcy, and in the administration of assets in this court, I cannot alter the rule, as applicable to this case, upon any impression of what might or might not have been a better rule; and I cannot distinguish a debt by judgment from any other debt not bearing interest. I do not apprehend that it ever made any difference in bankruptcy, as to debts not bearing interest, whether there was a surplus or not.

1824.

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I cannot see upon what principle it is possible for Count *Schulenberg* to insist that he is entitled both to the benefit of the proof upon the judgment, and to hold those securities whether they were good or not. The action brought was for all the damages that had been sustained by the Count, in consequence of their not having done what they had undertaken to do, and the

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Boyd.

judgment must be considered as a satisfaction for all which the plaintiff in that action had lost, in consequence of the non-performance of their obligation to him; and if there is any hardship in the case, it seems to me to be the effect of the law of *England*; and when it is said that more damages might have been recovered if the case had been properly conducted, that is a consideration into which this court cannot enter. Let me suppose that these papers are imperfect securities, of no value, except as furnishing the means of applying, upon the ground, not of a strict legal obligation, but of a moral obligation, to the *Austrian* government, is it possible that the Count can contend that he will have his action, because they have not made these papers effectual, and likewise have the benefit of these imperfect securities. Let me suppose that they are perfect securities; can it be said that the Count is to have the benefit of the action in which he has recovered the value of those securities, and at the same time not allow Mr. *Boyd* to take the chance of their proving beneficial. I think, therefore, that neither of these points can be maintained. The payment of interest before the action will not vary the case, for the judgment would be upon a verdict, in which the payment of prior interest would be considered. The judgment debt is to be considered as a new debt, and if it does not bear interest, the antecedent payment of interest will not be material.

With respect to what has been said as to supplemental matter, the petition of appeal should be confined to the subject matter of appeal; and if there is new matter to be introduced, it must be introduced upon a supplemental petition.

The exchequer bills were ordered to be delivered to the personal representative of Count *Schulenberg*, who

had died since the appeal, and the debentures were ordered to be delivered to Mr. Boyd, the costs of the petition of appeal to be paid by the appellant. (a)

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(a) By the 5 G. 4. c. 98. s. 55., not to take effect before the 1st of May, 1825, it is enacted, "that in all future commissions against any person or persons liable upon any bill of exchange or promissory note, whereupon interest is not reserved, overdue at the issuing the commission, the holder of such bill of exchange or promissory note may prove for interest upon the same, to be calculated by the commissioners to the date of the commission at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes," the clause not extending to other debts on which interest would be recoverable at law as damages; and by the 129th section of the same act, it is enacted "that the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns; and every such bankrupt, after the creditors who have proved under the commission shall have been paid, may recover the remainder of the debts due to him; but the assignees shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and in the order following: (that is to say) all creditors whose debts are now by law entitled to carry interest in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon, to be calculated from the *proof* thereof; and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts from the *proof* at the rate of 4 per cent." It should seem that by this section, creditors whose debts now carry interest in bankruptcy, and who in the case of a surplus are now entitled to interest from the date of the commission, would be excluded from interest between the date of the commission and the time of proof. By the Scotch bankrupt statute, 54 G. 3. c. 137. s. 49., interest is payable out of a surplus upon debts carrying interest, from the date of the first deliverance.

1823.

V. C.
LINC. INN.
June 11.

Bill by assignees to restrain a bankrupt from further proceedings at law to impeach the commission will not hold; the remedy is by petition.

KIRKPATRICK v. DENNETT.

THIS was a bill by the assignees of a bankrupt against the bankrupt, for the purpose of restraining all further proceedings at law by him to impeach the validity of his commission. To this bill the Defendant put in a general demurrer; *Flower v. Herbert*, 2 Ves. 326. was cited.

Mr. Bell and Mr. Wakefield for the Plaintiffs.

Mr. Treslove for the Defendant.

The VICE CHANCELLOR.

The objection to the jurisdiction was not taken in the case referred to. (a) The proper and familiar course is by petition. If this bill would lie, a bill in the Court of Exchequer would also lie, and bankruptcy would come to be administered in that Court. If, however, there were not this objection to the jurisdiction, I must allow this demurrer, upon the ground that the bill does not state a case which would entitle the assignees to the injunction prayed.

Demurrer allowed.

(a) Upon an examination of the case of *Flower v. Herbert*, in the registrar's book, it appears, that the bankrupt had presented a petition to supersede his commission, which had been dismissed, and that a meeting had been called to declare a dividend, before the bankrupt commenced this action at law, which that suit sought to restrain; and that upon the hearing of the cause, an issue was directed, to try whether the Defendant *Herbert* was, at the time of suing forth the commission, a bankrupt within the meaning of the statutes concerning bankrupts. See 1 Sim. & Sta. 408.

1823.

Ex parte STEAD In the Matter of LIDDARD.

L. C.
LINC. INN.
June 24.

THIS petition by the petitioning creditor stated the circumstances under which his debt, which was upon a guarantee of *Liddard*, dated the 26th February, 1820, arose, that on the 21st April, 1823, judgment was entered up, in an action of assumpsit brought by the petitioner for the recovery of that debt; that *Liddard* having disposed of all his effects, had in July or August, 1822, quitted the country, to avoid payment of the debt due on the guarantee; that the petitioner on the 3d of June, 1823, sued out a commission of bankrupt against *Liddard*; that on the 6th of June, three of the list of commissioners, to which the commission was directed, met to open the commission, and expressed themselves satisfied as to the proof of the trading and act of bankruptcy; but that one of the said three commissioners stated his opinion, that there was not such a debt as would support the commission, by reason that the debt was not ascertained till the verdict which was after the act of bankruptcy; that the debt first tendered to the said commissioners was for the amount of the verdict and costs; but that on the succeeding day, to which the commissioners had adjourned, the petitioner tendered a deposition founded on the original debt which it was alleged accrued due prior to the act of bankruptcy; that notwithstanding one of the said three commissioners still dissenting, nothing could be done; that of the other two commissioners nominally constituting the said list, one was dead, and the other was out of the country; and that the petitioner, under the circumstances, must either abandon the commission or appeal against the decision of the commissioners; and that the petitioner was desirous either of having the

Petitioning creditor being unable to obtain adjudication under the commission sued out by him, permitted under the circumstances, to take out another commission directed to another list upon the same docket papers.

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Es parte
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present commission proceeded with, or of having the same superseded and another commission directed to other commissioners; but such commission could not issue without the order of the Lord Chancellor for that purpose, and therefore prayed that the Lord Chancellor would be pleased to order the commissioners forthwith to proceed with the said commission, and to declare the said *W. Liddard* a bankrupt, or that otherwise the said commission might be superseded, and the petitioner might be at liberty to issue another commission; and that the petitioner might retain the expences of the application and of the order out of the estate of *Liddard*.

Mr. Rose for the petition.

The LORD CHANCELLOR ordered that the petitioner should be at liberty, if he should so think fit, to take out another commission against *Liddard* upon the same docket papers on which the said first-mentioned commission issued; and that such new commission be directed to the London list of commissioners next in turn at the bankrupt office, other than the list to which the former commission was directed; and that the further consideration of the said petition should stand adjourned until the next day of petitions. (*a*)

(*a*) A new commission accordingly issued, directed to the list next in rotation: one of the commissioners named in the commission being dead, and the other four being equally divided in opinion on the sufficiency of the debt, in August, 1824, application was made to the Lord Chancellor, that, under the special circum-

stances, the debt should be declared to be sufficient, and the commissioners be directed to proceed with the commission; the Lord Chancellor ordered such second commission to be superseded, and that a new commission should issue directed to the next list in rotation that was full.

1823.

In the Matter of GIBSON.

V. C.

June 29.

PETITION by the petitioning creditor against an assignee who had been removed, and the actual assignee for payment of his bill of costs as taxed by the commissioners.

Petitioning creditor cannot petition to be paid his taxed bill by a removed assignee, unless he charges collusion.

Mr. *Rose* for the petition.

Mr. *Montagu contra*.

The VICE-CHANCELLOR was of opinion, that unless there was charge of collusion between the removed and the present assignee, he could make no order upon the removed assignee, who by his removal had become a mere debtor to the estate, and accountable to the present assignee.

An enquiry was directed whether the present assignee had received (a) any funds applicable to the payment of the petitioning creditor's bill.

Ex parte STOVELD. — In the Matter of UPPERTON.

V. C.

LINC. INN.

July 1.

THE petition stated, that in March, 1806, articles of partnership had been executed between *William Upton*, the petitioner, the said *Upperton*, and *Thomas Poling Upton*, whereby it was, amongst other things,

Solvent partner appointed receiver without salary of the partnership property, &c.

(a) It was pressed that the enquiry should extend as to any funds which the assignee might have received but for his wilful default; whether the Court, upon the petition of the peti-

tioning creditor for the payment of his bill, can direct an enquiry as to what might have been received but for the assignee's wilful default, quære.

1823.

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 GROVELD.
 In the matter
 of
 WERTON.

agreed, that the said parties would become partners, as bankers, for the term of fourteen years; that on or before the 1st day of June then next, each of the partners should purchase and transfer 1000*l.* three *per cent.* bank annuities into their joint names, to be sold out as occasion might require, in case of any sudden call upon the firm, in which case each partner should replace his proportion, so that the full amount of 1000*l.* bank annuities for each partner should remain standing in their names for such purposes, the interest and dividends to be applied as part of the common profits of the partnership: and it was further agreed that in case either of the parties should be indebted to the other, or to the joint stock, then that such party should not be at liberty to take to himself his share of such joint stock, until such joint debt should be paid; that no right, benefit, or survivorship should be taken by either of the parties; but in case either of them should happen to die, or become bankrupt, during the continuance of such partnership, the parties surviving, or not having become bankrupt, should, within twelve months after the death or bankruptcy of such partner, pay to his executors, &c. or assignees his share of the joint stock and the increase thereof, together with the interest, and should indemnify the executors, &c. or assignees of such deceased or bankrupt partner against all incumbrances, debts, or demands on account of the said partnership; but it was nevertheless agreed, that in case the party dying, or becoming bankrupt, should, at his death or bankruptcy, be indebted to the other party, or the joint stock, then that the survivor, &c. should be at liberty to deduct the amount of such debt out of the share or proportion of the deceased or bankrupt partner; and that from and after the death or bankruptcy of such partner, the joint stock, and all the debts and effects thereunto belonging, should become the property of the partners surviving,

or not becoming bankrupt, subject to such payment and indemnity as aforesaid, to the executors, &c. or assignees of the deceased or bankrupt partner, and that such executors, &c., or assignees, should not afterwards make any claim to any part thereof; that in 1812, *William Upton*, and, in 1815, *Thomas Upton*, retired from the partnership; that in May 1822 this commission issued; that *Luke Upperton*, the bankrupt's brother, and *James Ford*, his cousin, had been chosen assignees; that at the date of such commission *Upperton* was indebted to the petitioner in the sum of 1229*l.*, for money lent, for which the petitioner held *Upperton's* bond, which he had proved against his separate estate; that *Upperton* had been for several years in the habit of overdrawing his accounts, and had, on several occasions, applied the partnership monies and effects to his own private use, without the petitioner's knowledge; and had thereby become indebted to the partnership in the sum of 2500*l.*; that at the date of the commission the partnership was indebted to various customers, in respect of banking accounts, in the sum of 8800*l.*, and upon notes of the bank then outstanding, in the further sum of 10,000*l.* or 12,000*l.*; that the partnership effects, exclusive of the 2000*l.* bank annuities aftermentioned, were not sufficient to pay the partnership debts: that the petitioner had recently discovered that *Upperton*, shortly before his bankruptcy, had applied the sum of 850*l.* partnership-money in payment of some private debts, and in the purchase of 400*l.* navy five per cent. annuities, which annuities, the petitioner submitted should be considered as partnership property; that the petitioner had, since the issuing of the commission, paid the whole of the said partnership debts, amounting to 8800*l.*, out of his separate effects, and also a considerable part of the outstanding partnership bank-notes,

1822.

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—
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 of
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partly out of his own separate property, and partly out of the partnership effects in his hands; that the petitioner had applied to prove, against the bankrupt's separate estate, the balance due from the bankrupt, and also a moiety of the sum of 8800*l.* so paid off by the petitioner since the issuing of the commission, the petitioner having offered at the same time to indemnify the bankrupts separate estate against the payment of the partnership debts; that the commissioners had refused to admit such proof, upon the ground that no proof could be made by the petitioner in either of such cases, until the account had been taken between the petitioner and the bankrupt, and a general balance ascertained. The petition therefore prayed, that the 400*l.* navy five *per cent.* annuities might be declared partnership property, and that upon the petitioner's indemnifying the assignees against all demands in respect of the partnership, such navy five *per cent.* annuities, together with all the other partnership property and effects, might be delivered up and transferred to, or retained by, the petitioner, to be by him applied in payment of the joint debts of the partnership, or of the monies advanced by the petitioner for that purpose, since the commission, as far as the same would extend, and that the petitioner might be permitted to prove against the separate estate of *Upperton* the said sum of 2500*l.*, or such other sum as he should appear to be indebted to the partnership upon the balance of accounts, and also a moiety of all such further sums as should be paid by the petitioner in respect of such of the partnership debts as might remain to be satisfied after the partnership effects should be exhausted; and that for the purposes aforesaid the petitioner might be at liberty to call meetings of the commissioners, and that the commissioners might, if necessary, be directed to keep distinct accounts of the separate estate of the bankrupt, and of the joint

estate of the bankrupt and the petitioner, possessed by the assignees under the commission; and that the costs of the application might be paid out of the separate estate of *Upperton*.

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Ex parte
STOVELD.
In the matter
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UPPERTON.

Mr. *Wetherell* and Mr. *Roots* for the petition, relied on *Ex parte Taylor*, 2 *Rose*, 175; *Wood v. Dodgson*, 2 *Rose*, 47; *Ex parte Ogilvy*, 2 *Rose*, 177; and *Ex parte Yonge*, 3 *Ves. & Beames*, 31. 2 *Rose*, 40.

Mr. *Bell* and Mr. *Rose* against the petition.

The Vice-Chancellor thought this was a case in which the solvent partner should be enabled to deal solely with the partnership property: and ordered that the petitioner should be appointed receiver of the partnership property without a salary: and that it should be referred to one of the Masters in Chancery to settle and approve of the proper security to be taken from the petitioner for the due execution of his office as receiver, and that the petitioner should give such security when so approved of and settled: that the petitioner should account from time to time as such receiver, as the Master should from time to time direct: that all proper parties should be examined before the Master upon interrogatories, or otherwise, touching the matter in question, and should produce upon oath, all books, &c. relating thereto as the Master should think fit: that the petitioner should furnish the assignees with a full and true statement of all the effects and debts of the partnership: that such assignees should be at liberty at all reasonable and convenient times to inspect the books of the partnership, with liberty for either party to apply: and that the costs of the petition should be paid out of the joint estate.

1823.

LINC. INN. *Ex parte* THOMPSON. — In the Matter of HEDLEY.
July 9.

Objection, that the solicitor attesting the petition, being at the time in prison, was within 12 G. 2. c. 13. s. 9.; overruled.

MR. *Whitmarsh* objected, that the solicitor attesting the petition was at the time a prisoner in Durham gaol, and that the proceeding was within the stat. 12 G. 2. c. 13. s. 9., which enacts, "that no attorney or solicitor, who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall, during his confinement, in his own name, or in the name of any other attorney or solicitor, sue out any writ or process, or commence or prosecute any action or suit in any courts of law or equity; and that all proceedings in such actions or suits shall be void and of none effect:" that the proceeding in this petition having been commenced during the solicitor's confinement, was therefore void.

The VICE CHANCELLOR.

That clause goes on to say, that any attorney or solicitor commencing or prosecuting any such action or suits, &c., shall be struck off the rolls, and incapacitated from acting as an attorney or solicitor for the future. It is, therefore, highly penal, and must be construed strictly; but a petition in bankruptcy is not, strictly speaking, a proceeding either in law or equity.

1823.

Ex parte BARNED and MOZLEY.—In the Matter
of TARLTON.

V. C.
LINC. INN.
July 9.

THE petition stated, that previously to the month of December, 1820, *Tarlton* carried on business at Liverpool, in partnership with *William Smith*, under the firm of *John Tarlton and Co.*, and at Bahia, under the firm of *William Smith and Co.*; that *Smith* died in December, 1820; that in May, 1821, the petitioners, as holders of dishonoured bills, accepted by *Tarlton* and *Smith*, under their firm of *John Tarlton and Co.*, amounting to 742*l.* 18*s.* 7*d.*, issued a commission against *John Tarlton*, by the name and description of "*John Tarlton, of Liverpool, in the county of Lancaster, merchant, surviving partner of William Smith, late of Bahia, in Brazil, deceased, which said John Tarlton and William Smith late carried on trade at Liverpool aforesaid, under the firm of John Tarlton and Co., and at Bahia aforesaid, under the firm of William Smith and Co.;*" that under such commission *Tarlton* had been declared bankrupt, and *Burnside* and *Coomb*, together with the petitioner, *Musley*, had been chosen assignees, and as such had possessed themselves of the joint estate of *Tarlton* and *Smith*, and also of the separate estate of *Tarlton*; that the joint creditors of *Tarlton* and *Smith* and the separate creditors of *Tarlton*, had proved their debts under the commission, which debts had been admitted by the commissioners, as proofs against that estate, liable to satisfy the same, and in respect whereof the same were contracted; that *Smith* had also a separate estate and separate creditors; that the petitioners had proved their debt of 742*l.* 18*s.* 7*d.* under the commission, and at a meeting for declaring a dividend of the separate estate of *John*

Where a joint creditor sues out a commission against *A.* "as surviving partner of *B.*," he can claim only against the joint estate.

1823.
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Ex parte
BARNED.
In the matter
of
TARLTON.

Tarlton, claimed to receive dividends on their debt out of such separate estate ; which claim the commissioners had rejected, assigning as a reason for that rejection, by a memorandum to that effect, filed with the proceedings, “ that in their opinion the commission was not a separate commission against one of two partners, but a commission against a surviving partner.” The petitioners submitted, that the judgment of the commissioners was erroneous, and prayed, that distinct accounts might be ordered to be taken of the joint estate of *Tarlton* and *Smith*, and the separate estate of *Tarlton* ; and that the joint funds might be divided amongst the joint creditors, and the separate funds of *Tarlton* amongst his separate creditors ; and that the petitioners, as petitioning creditors, might be declared to be entitled to receive dividends on their said debt, out of the separate estate of *Tarlton* ; and that the costs of the petition might be paid out of such separate estate.

Mr. *Bell*, for the petition, argued, that it was a separate commission ; that the style of “ surviving partners ” was merely descriptive of the person ; that if the commission had been against *John Tarlton* without that addition, the joint and separate estate would equally have been vested in the assignees, and that the description could not be intended as a conclusive election to prove against the joint estate.

Mr. *Agar*, *contra*, contended, that it was not a description of the person, but that it pointed out the estate against which the commission was directed, and that a commission against *A.* and *B.*, as surviving partners, must clearly be a joint commission ; that a separate creditor could not have maintained the commission.

The VICE CHANCELLOR.

1823.

I am of opinion, that the commissioners were right in rejecting the proof of the petitioning creditors against the separate estate. It is remarkable that the question should not hitherto have been raised, how far a commission against a party, as surviving partner, is to be considered a joint or separate commission. This commission against *Tarlton* certainly includes the taking charge of the joint estate; a separate commission is a commission against the separate estate, and affects the joint estate, so far only as the bankrupt has an interest in the separate estate. But this is a commission in which the assignees are entitled to possess the joint estate, and to administer it as joint estate. A joint creditor may at law proceed by execution against separate estate, and is therefore permitted to sue out a commission against separate estate; but a commission against a person, as surviving partner of another, is a statute execution against joint and separate estate, and the petitioner a joint creditor must claim against the joint estate.

Ex parte
BARNED.
In the matter
of
TARLTON.

Petition dismissed.

Ex parte BOURNE. — In the matter of BOURNE.

Revised 28. 2. 1827.

V. C.
LING. INN.
July 14.

THE petition stated, that previously to the issuing of the commission against the petitioner, he had been possessed of a profitable business, as proprietor and pub-

defeated without superseding the commission, the Court will not interfere: otherwise, if the fraudulent object can only be prevented by the superseding of the commission.

Though a commission be taken out for an undue purpose, yet if that purpose can be

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Ex parte
Bennett.
 In the matter
 of
Bennett.

lisher of a provincial newspaper; that during the petitioner's absence from his residence, *Joseph Bennett*, his father-in-law, who had advanced him monies for the purchase of the printing materials of the newspaper and for other purposes, and who had often urged the petitioner to dispose of the copyright and printing materials of the newspaper, in order to enable him to satisfy the debt due to him, *Joseph Bennett*, but which request the petitioner had always positively refused to comply with, did without the petitioner's knowledge or consent, sell the copyright of the newspaper together with the petitioner's printing materials for less than one-third of its value, to Messrs. *Clarke, Higgs, and Penny*; and had, in the absence of the petitioner, put them into possession of the same, together with the petitioner's books of account and manuscripts, and retained the purchase-money to his own use; that the petitioner, on being informed of the transaction, wrote to the purchasers denying the authority of *Bennett* to sell the copyright of the newspaper or the petitioner's printing materials, and forbidding them to proceed with the purchase; whereupon a meeting had taken place between them and *Bennett*, when *Bennett* assured them that he would compel the petitioner to assent, or that he would arrest the petitioner and keep him in gaol; and directed the purchasers to pay no attention to the petitioner's letters; that the petitioner refused to ratify the sale of his property by *Bennett*, who had thereupon recourse to threats, and stated before all the parties present, that he would adopt such measures as would compel the petitioner to ratify the same; that in Trinity term, 1822, the petitioner commenced an action of trespass against *Bennett* and the purchasers, to which the general issue was pleaded: and notice of trial was given for the *Dorchester* assizes on the 25th of July, 1822; that during

the progress of such action *Bennett* repeatedly informed the petitioner's friends that he knew the petitioner to be totally without the means of bringing his action to a trial; and that if the petitioner should give notice of trial, he, *Bennett*, would issue a commission of bankruptcy against the petitioner and thus stop such action; that on the 11th of July, 1822, a commission had been issued by *Bennett*, under which the petitioner had been declared bankrupt; that a proposal had been made by the solicitor of *Bennett* to the petitioner's solicitor that the commission should be superseded upon the petitioner's withdrawing his action; that the petitioner, notwithstanding the commission, was advised to proceed to trial with his action, which was called on for trial on the 26th of July, 1822, when *Bennett* and the other Defendants pleaded the bankruptcy of the petitioner, and the assignment to a provisional assignee as a plea puis darrein continuance, and the petitioner was therefore estopped from proceeding in his said action,

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Ex parte
Bouang.
In the matter
of
Bouang.

The petitioner submitted that the object of the commission was to deprive the petitioner of all power of procuring redress at law, and was an abuse of the great seal, and a direct injury to the petitioner's general creditors; and therefore prayed, that the commission might be superseded at the expence of *Bennett* and his attorney, and that the bond might be assigned.

It was sworn in the affidavits in answer, that the sale of the petitioner's property made by *Bennett* was by the petitioner's own authority; and that *Bennett*, being indignant at the refusal of the bankrupt to confirm the sale, determined to enforce his debt by legal proceedings.

1823.

Ex parte
BOURNE.
In the matter
of
BOURNE.

Mr. *Heald* and Mr. *Rose*, for the petition, contended, that this commission could not stand, inasmuch as it had been taken out for purposes foreign to the just object of a commission; not for the benefit of the creditors, but to deprive the bankrupt of the power of procuring redress at law for the injury he had sustained: that the great seal was not to be made the instrument of oppression; and however complete the requisites might appear, yet, that if the commission be in any manner for the indirect attainment of other than the legitimate object, it is supersedable: that the cases *Ex parte Gallimore*, 2 *Rose*, 424. and *Ex parte Wilbean*, *Buck*. 459., shew that the Court will notice the motives with which a commission is issued: that in *Ex parte Gallimore*, the Lord Chancellor, in noticing the argument of counsel, that providing there were requisites to support a commission, it was the right of the creditor, and that this Court could not look at his motives, says, "I do not agree to this proposition: it is the duty of the Court to guard against its process being abused, by being directed to the attainment of objects for which it was never intended to be applicable;" that in *Ex parte Harcourt*, 2 *Rose*, 203., the Lord Chancellor entered into the motives of the parties, and superseded a commission with costs, which, though there existed every requisite for a valid commission, had not been taken out for its legitimate purpose, but to enforce the party's own private objects: that from *Ex parte Brown*, 1 *Rose*, 434. the same principle was to be collected.

Mr. *Hart* and Mr. *Seymour*, against the petition, argued, that if the course of issuing and prosecuting the commission be legal, the Court had no right to act upon its judgment of motives, that unless some overt acts of ill faith appeared such as had characterised all

the cases cited, the parties availing themselves of the powers which the law had given them, and using such powers legally, must have the credit of adopting them with a good motive; that the allegation of *Bennett's* having sold the petitioner's property without authority had been sufficiently disproved, and the issuing of the commission, therefore, was not to protect *Bennett* in such alleged wrongful act, or to prevent the prosecution of the action, but as the only means left of obtaining his rights, though in effect it might operate as a bar to the bankrupt's proceeding in the action; that in *Ex parte Wilbean* and *Ex parte Gallimore*, the commissions were not superseded.

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Ex parte
BOURNE.In the matter
of
BOURNE.

The VICE CHANCELLOR.

This commission, sued out by *Bennett*, the father-in-law of the bankrupt, is challenged on the ground that it was sued out, not for the due administration of the bankrupt's estate, but for the fraudulent purpose of defeating the bankrupt's action. Upon reading all the affidavits, it is plain that the commission did not originate in that motive; but that *Bennett* being indignant at the conduct of the bankrupt, in refusing to confirm the sale, determined to punish the bankrupt, by enforcing his debt, not at first by a commission but by arrest. The bankrupt, aware of that purpose, absconded, and *Bennett* had no means of enforcing his debt but by a commission.

It is true, that a resort to a commission had consequences with respect to the action brought by the bankrupt, which the arrest would not have had, inasmuch as after the commission issued, the right of prosecuting the action devolved to the provisional assignee, but that

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Ex parte
Bourne.
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of
Bourne.

was not the original motive of the commission. I am willing, however, for the sake of the principle, which is of considerable importance, to suppose, that *Bennett* sued out the commission for the unjust purpose of defeating the bankrupt's action; and I still come to the conclusion, that this is not a ground for superseding the commission. Courts of justice have nothing to do with the motives of parties, who assert in a legal manner their legal rights, whether the motives be just or unjust. If a commission issued upon an unjust motive becomes an efficient instrument of fraud, and the bankrupt cannot be relieved from the fraud of which the commission is an instrument but by superseding the commission, the Court will interfere and supersede the commission in order to defeat the fraud; but however unjust the motive of the petitioning creditor may be, if the fraudulent purpose may be defeated without superseding the commission, the Court will not interfere. I apply this principle to the present case, as if the facts warranted it, though I have already said I think the facts do not warrant the application of that principle. Supposing that the commission was sued out for the fraudulent purpose of defeating the action, yet unless it could effect that fraudulent object, and the bankrupt could not be relieved but by superseding the commission, the Court would not interfere. This commission could not effect that fraudulent purpose; for although the bankrupt himself is prevented by the commission from proceeding in the action, yet his assignees may proceed, and the Court is not to intend that the assignees will not do their duty. If the action be founded in justice, it would be the duty of the assignees to prosecute it for the benefit of the creditors; and were the assignees to neglect their duty by not prosecuting the action, the Court, upon the application of the bankrupt,

would give him the opportunity of proceeding in it. It is plain, therefore, here, that in any view of the case, the imputed fraud may be defeated, without superseding the commission. In the cases cited the fraudulent purpose was effected, and no relief remained to the bankrupt, but by relieving him from the commission itself. Though I believe the action to have been improperly brought, I cannot refuse the petitioner the opportunity of trying it, but not at the expence of the estate. If he succeeds, and recovers damages, those damages will form a part of his estate for the benefit of his creditors.

It was ordered, that the bankrupt should be at liberty to proceed in the action. The rest of the petition was dismissed.

1823.

Ex parte
BOURNE.
In the matter
of
BOURNE.

Ex parte CUTTEN. — In the matter of RUSPINI.

LINC. INN.
Aug. 2.

THE petition stated, that on the 6th of February 1821, a commission, had issued against *Ruspini* upon the petition of *G. Watts, F. Accum, W. Bignall, and S. Sandell*, under which the petitioner was employed as messenger by the petitioning creditors, and as such, took possession of the bankrupt's estate and effects, was continued messenger by the assignees; that on the 4th of June 1821, the bankrupt presented a petition for a *supersedeas*, upon the ground, amongst others, of there not being a good petitioning creditor's debt; that such petition was afterwards abandoned; that on the 16th of June 1821, the bankrupt passed his last examination; that he had joined in the conveyance of a certain part of his property, and had

Bankrupt who had abandoned a petition presented by him in June 1821 for a *supersedeas*, and had joined in a conveyance of part of his property, and solicited and procured the requisite signatures to his certificate, restrained from proceeding in an action brought by him against the messenger to impeach the commission.

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solicited and obtained the requisite signatures to his certificate; that on the 28th of January 1822, the bankrupt wrote to Mr. *Wheeler*, the solicitor of the assignees, requesting him to get his certificate signed by the commissioners, and gave the said solicitor his acceptance for the expences attending the same; that the bankrupt had subsequently by letter countermanded the directions given to Mr. *Wheeler*, stating that something had occurred which rendered it improper to apply for the commissioners; that the occurrence alluded to by the bankrupt was, that by the death of a relation, he had become entitled to a considerable property, which would pass to the assignees should the commission remain in force, for which reason he had determined to endeavour to procure the same to be superseded; that accordingly on the 14th of January 1823, a demand was made upon the petitioner for certain property of the bankrupt, seized by the petitioner under the commission, and in April 1823, an action of trespass was commenced by the bankrupt against the petitioner, as messenger under the commission; that the petitioner caused notice to be sent to the four petitioning creditors, informing them that an action of trespass had been commenced against the petitioner as messenger, at the suit of the bankrupt, and calling upon them, the petitioning creditors, to indemnify him against such action, and to defend the same; that no answer was received from the petitioning creditor *Accum*, who had absconded, that the answers of the other three petitioning creditors *Watts*, *Bignall*, and *Sandell*, contained no reference to the petitioner's demand of indemnity, but merely stated their willingness to establish, in the usual manner, the debts due to them from the bankrupt. The petitioner, therefore, prayed that the bankrupt might be restrained from any further proceedings in such action; or that the three petitioning creditors *Bignall*, *Watts*, and *Sandell* might

be ordered to indemnify him against any damages and costs in respect thereof, and that the costs of the petitioner in respect of such action, and of the indemnity, should the same be ordered, and the costs of the present application should be paid by the said *Watts, Bignell, and Sandell*, some or one of them; to be taxed as between solicitor and client.

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Mr. *Horne* and Mr. *Montagu* for the petition, submitted that the relief sought by this petition was proper to be obtained by petition in the bankruptcy rather than by bill; and that though in *Flower v. Herbert*, 2 Ves. 326. the proceeding was by bill, no question was raised as to the proper course.

Mr. *Wakefield* for the bankrupt, contended that, though after the length of time during which the bankrupt had acquiesced in his commission, this Court would not assist him to supersede his commission, yet it would never by injunction restrain him from contesting it at law. All the cases which confirm the first proposition, also prove the second; for in none of them is the bankrupt estopped from his remedy at law, though his application to this Court has been dismissed. *Ex parte Nutt*, 1 Atk. 102.; *Ex parte Crisp*, 1 Atk. 184.; *Ex parte Moule*, 14 Ves. 602.; *Ex parte Kirk*, 15 Ves. 467.; *Ex parte Bentham*, November 5. 1807, and April 7. 1808. With the case *Ex parte Kirk* this is precisely a parallel; and nothing more is sought here than what was there gratuitously ordered by the Court — to try the validity of the commission at law.

The VICE-CHANCELLOR.

The difference between this case and *Ex parte Kirk*, and which takes the present entirely out of the princi-

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ple of that case is, that in *Ex parte Kirk* there was only delay on the part of the bankrupt, and passive acquiescence in his commission; here there has been active co-operation on the part of the bankrupt. For delay alone, this Court merely refuses to interfere before a trial establishing his legal rights. In the present case, the bankrupt's active interference with the administration of his estate, amounted to a pledge to his assignees that he would not attempt to disturb the commission; and of such concurrence there is abundant evidence, in his having executed deeds, and taken measures to obtain his certificate; and having thus, while it appeared beneficial, taken advantage of his commission, he shall not now be allowed to impeach it. His conduct has been calculated to induce the assignees to prosecute the commission in security; and the same rule must be applied, as where a bankrupt harasses his assignees with repeated actions: and in such cases this Court will not only not relieve the bankrupt in the first instance, but will restrain him from proceeding at law.

By the order the bankrupt was restrained from proceeding in his action; and it was ordered, that *Watts*, *Bignall*, and *Sandall*, three of the petitioning creditors, and the assignees, should pay the petitioner the costs, charges, and expences of, and occasioned by, and incidental to the petition and the action at law, in equal moieties; and that the assignees should retain for themselves, and pay to the said *Watts*, *Bignall*, and *Sandell*, in equal proportions, out of the bankrupt's estate, what they should so pay. The costs of the assignees and of the three petitioning creditors, to be paid out of the bankrupt's estate. (a)

(a) See *Flower v. Herbert*, 2 Ves. 326., and the note to *Kirkpatrick v. Dennett*, ante, 500.

1823.

Ex parte KETTLEWELL and Others. — In the LINC. INN.
Matter of SMITH. Aug. 7.

BY indenture of November 16, 1813, *Hannah Wetherill* assigned to *Robert Smith*, his executors, and administrators, the sum of 600*l.*, in trust to invest the same in his name in government or real securities, and to pay the dividends or interests thereof to the said *Hannah Wetherill*, during her life, and after her decease, in trust, that *Smith*, his executors or administrators, should pay all such dividends or interest, except of the principal sum of 100*l.*, part of the said principal sum of 600*l.* (which sum of 100*l.* it was thereby declared *Smith*, his executors or administrators, might deduct and retain for his or their care, pains, and diligence during one year next after such decease of the said *Hannah Wetherill*,) for and towards the maintenance, education, and support of the child or children which *Hannah Wetherill* might happen to leave, until such child or the youngest of such children should attain the age of twenty-one years, and then for the absolute use and benefit of such child or children equally; and if the said *Hannah Wetherill* should die without issue, or having had such, all of them should have died in her lifetime, then in trust, that *Smith*, his executors or administrators, should assign such remaining stock or

H. W. assigned to *R. S.* 600*l.* in trust to invest, to pay the interest or dividends thereof to *H. W.* for life, and after her death, in trust that *R. S.* should pay all interest or dividend, except of the principal sum of 100*l.*, part of the 600*l.*, (which it was declared *R. S.* might deduct and retain for his care and pains during one year next after the death of *H. W.*) for the benefit of the children which *H. W.* might leave; and if *H. W.* should die without issue, then in trust, as to the remaining stock and the dividends or interest due thereon, unto *A. W.* and *M. W.*, the

sisters of *H. W.*, or their children in case of the death of either of them, in equal proportions, and *H. W.* thereby agreed that *R. S.* should retain out of the trust monies all costs and charges in respect of his trust, and the clear yearly sum of 20*l.* for his care and trouble, and also the said sum of 100*l.* for one year's allowance for such care and trouble which he should have from the death of *H. W.*, and then the said annual sum of 20*l.* from the end of such year until the trusts should be completed. *R. S.* applied the 600*l.* to his own use, paying the interest to *H. W.* during his life. *H. W.* died in July 1819, and in Jan. 1822, *R. S.* became bankrupt. Upon a petition by the parties entitled upon the death of *H. W.*: Held, that the proof should be only for the 500*l.*

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sum, with the dividends, or interest due thereon, unto *Ann Wetherill* and *Mary Wetherill*, the sisters of the said *Hannah Wetherill*, or to their children, in case of the decease of either of them, in equal proportions; and the said *Hannah Wetherill*, for herself, her heirs, &c. covenanted and agreed, that it should be lawful for *Smith*, his executors or administrators, to retain, out of the trust monies, all costs and charges incurred in the execution of the trusts, and also the clear yearly sum of 20*l.*, for the care and trouble which he or they should take in the performance of the same, and also the said principal sum of 100*l.*, as and for one year's allowance for such care and trouble which he or they should take and have from the time of the decease of the said *Hannah Wetherill*; and then the said original annual sum of 20*l.*, from the end of such year, until all the several trusts thereby made and appointed should be finished: and that *Smith*, his executors or administrators, should not be answerable for any loss which might happen, in investing such trust monies, unless occasioned by his or their wilful neglect.

Smith accordingly became possessed of the sum of 600*l.*, but instead of investing it in government or real security as directed by the indenture, applied it to his own use, paying, nevertheless, the interest upon such sum to *Hannah Wetherill* during her life. In July, 1819, *Hannah Wetherill* died without issue; and in January, 1822, *Smith* became bankrupt.

This was a petition by *William Kettlewell* and *Mary* his wife, (formerly *Mary Wetherill*,) and the two infant children of *Ann Taylor*, (formerly *Ann Wetherill*,) to prove the sum of 600*l.* under *Smith*'s commission.

Mr. *Rose* for the petition.

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Mr. *Barber* for the assignees.

Ex parte
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The VICE-CHANCELLOR was of opinion, that the proof could only be for the sum of 500*l.*, inasmuch as *Hannah Wetherill* having died before the time of the bankruptcy, the sum of 100*l.* had then become the absolute property of *Smith*. And ordered, that the petitioners be adjudged to prove the sum of 500*l.*; and that the petitioner, *William Kettlewell*, be at liberty to make such proof on behalf of himself and the other petitioners; and that the assignees should pay to the petitioner, *William Kettlewell*, one moiety of the dividends payable upon such proof; and that the other moiety of such dividends should be paid into the bank of England in the name of the Accountant-General, to the credit of the matter of *Robert Smith*, a bankrupt, to be laid out in the purchase of 3 *per cent.* annuities; and that this order should be drawn up and entered with the register of the Court of Chancery.

Ex parte GYDE. — In the matter of HART.

Aug. 15.

IN June 1818, the petitioner agreed to sell to *Hart* certain premises at Cheltenham for the sum of 1500 guineas with interest thereon till payment; and a memorandum of that agreement was signed by both parties: part of the purchase-money, to the amount of 421*l.* 14*s.* 2*d.*, was paid to the petitioner; but no conveyance of the ground was executed, and the remainder

Application by vendor, who had not conveyed, for a sale of the premises in discharge of his lien for the unpaid purchase money, and to prove for any deficiency granted.

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of the purchase-money still remained due when this commission issued against *Hart* in October 1820. The petitioner claiming to have an equitable lien upon the premises comprised in the said memorandum of agreement for the sum of 115*l.* 5*s.* 10*d.*, the residue of the purchase-money, with interest thereon, prayed by this petition that it might be so declared, and that it might be referred to the commissioners to take an account of what was due for principal and interest in respect of his purchase-money; and that the premises comprised in the said contract might be sold, the petitioner offering to concur in such sale, that the proceeds might be applied in payment of what should be found due on that account, and the petitioner be admitted to prove the deficiency.

Aug. 3,
 1822.

Upon the hearing of this petition before the Vice-Chancellor, his Honour was of opinion that the petitioner having both the legal and the equitable title in himself, this case was not within the principle of equitable mortgages, and that the remedy of the petitioner was by bill, and dismissed the petition with costs.

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 1823.

Against this decision the petitioner appealed, and the case was argued before the Lord Chancellor.

Mr. Heald and *Mr. Stephen* for the petition, contended that this Court could enforce the clear lien of the petitioner for his unpaid purchase-money, upon petition, as in the ordinary cases of equitable mortgage, against assignees representing the owner of the estate in equity, and as incidental to the question of proof, and cited *Bowles v. Rogers*, *Cooke's B. L.* 146.; *Ex parte Lord Seaforth*, 1 *Rose*, 306; *Ex parte Hunter*, 6 *Ves.* 94; *Ex parte Sege*, 1 *Rose*, 232; and *Ex parte Rowton*, 1 *Rose*, 15.

Mr. *Rose*, against the petition, urged that a specific performance could not be enforced against the assignees, and that the assignees had a right to abandon the bargain, and that the present petition would carry the doctrine of equitable lien far beyond the principle of any decision.

1823.

Ex parte
GYDE.
In the matter
of
HART.

The LORD CHANCELLOR.

This case does not appear to me to differ from the ordinary uses of equitable lien. Here was a contract signed by the parties for a sale of land, for 1500 guineas, with interest till paid; by force of such contract the purchase money became, in equity, the property of the vendor, and the premises the property of the purchaser; and if between the date of the contract and the bankruptcy no agreement has been made which amounts to a waiver of the contract, I do not see how the prayer of the petition can be refused. In some cases it has been considered that the fact of non-conveyance makes the case much stronger, and the execution of the conveyance and delivery of possession have been argued to be a waiver of the lien. (a)

The order made by the Vice-Chancellor was discharged, and the usual order was made for an account of what was due to the petitioner, and a sale of the premises and payment of any surplus to the assignees, on payment of any deficiency. The costs of the petition of appeal were ordered to be paid out of the bankrupt's estate to the petitioner, who had paid the costs of the original petition.

(a) *Fowell v. Hindes*, Amb. 724. *Smith v. Hibbard*, 2 Dick. 730.

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LINC. INN. *Ex parte* CARTER and CURRY.—In the Matter
July. of SIMS.

Form of issue
 as to concert.
 Practice as to
 the direction
 that parties
 should be ex-
 amined on the
 trial of the
 issue.

THIS petition, by the assignees of Messrs. *Minchin, Carter, and Kelly*, who had been the bankers of the bankrupt, *Sims*, stated various circumstances to shew, that the commission against *Sims* had been concerted by the bankrupt, his solicitor, and the petitioning creditor (a), and prayed that it might therefore be superseded at the expence of the petitioning creditor.

There were many and conflicting affidavits, and the parties to the alleged concert made affidavits in support of the commission.

The VICE-CHANCELLOR having directed an issue, as to the concert, said, that where the parties to the alleged concert make affidavits to support the commission, which are not so satisfactory as to enable the Court to come to a conclusion, and the Court is compelled to direct an

(a) In *Ex parte Laycock* in the matter of *Turner*, 16th July 1822, where it appeared that it had been agreed between the bankrupt and a third person, with a view to a friendly commission, that an act of bankruptcy should be concerted, and the act of bankruptcy took place accordingly: a hostile creditor, who was not a party to the concert, took out a commission founded on the concerted act; the Vice-Chancellor held the commission good. In *Ex parte Knight* in the matter of *Mackie*, 17th July 1822, the Vice-Chancellor inclined to the opinion, that if the bankrupt procure A. to induce B. to sue out a commission, it would not be the bankrupt's commission, unless B. acted with a view to the purposes of the bankrupt.

issue to try the concert, the Court will direct the parties to the alleged concert to be examined at law.

1823.

Ex parte
GARTER.

In the matter
of
Sims.

It was ordered, that the parties should proceed to a trial, upon the following issue: whether the commission of bankrupt awarded and issued against *Sims* was taken out by concert between *Sims* and the petitioning creditor, in which issue the petitioners were to be plaintiffs and the petitioning creditor was to be defendant; and it was further ordered, that the bankrupt should be examined upon the trial of that issue; and that either party, Plaintiffs or Defendants, should be at liberty to examine the petitioning creditor. (a)

Ex parte BARRATT and Another. — In the matter
of COWELL.

LINC. INN.
July 14.

THIS petition of the assignees stated, that previous to the commission which issued against *Samuel Cowell* on the 10th of January, 1820, there were various transactions between him and *Bridges*, in the way of discounting bills, paying and receiving cash, and otherwise, in the usual course of dealing between banker and cus-

Where a creditor proved in respect of several bills of exchange drawn by the bankrupt, and discounted by the creditor, and one of those bills was subsequently wholly paid: Held, that so much of the proof as related to that bill must be expunged.

(a) In *Ex parte Holt* in the matter of *Wood*, which was a petition to supersede on the ground of concert, an issue was directed by the Lord Chancellor to try the question of concert in the following terms, which were spe-

cially dictated by his Lordship; "Whether the commission was sued out at the instance or by the procurement of the bankrupt, or by concert between the petitioning creditor and the bankrupt." 28th of August 1819.

1823.

Ex parte
BARNATT.
In the matter
of
COWELL.

toimer; that in the month of December, 1819, *Bridges* discounted for the bankrupts, amongst others, a bill of exchange for 74*l.*, dated the 3d of December, 1819, drawn by the bankrupt upon, and accepted by *Samuel Gillham*, payable six weeks after date, to the order of the bankrupt; that the amount thereof was placed to the credit of the bankrupt, in his account with *Bridges*; that on the 10th of January, 1820, a commission issued against *Cowell*; that the said bill for 74*l.* was at maturity dishonoured by *Gillham*, who afterwards, on the 27th of January, 1820, paid to *Bridges* 15*l.*, in part discharge thereof; that *Bridges*, at the instance of the petitioners, commenced an action against *Gillham*, to compel payment of the residue due on his acceptance; and that *Gillham*, by way of settling the action, delivered to *Bridges* 9*l.* in money, and three bills of exchange for 20*l.*, 15*l.*, and 15*l.* payable severally, at two, six, and nine months after date; making together, with the before-mentioned 15*l.*, the full amount of the bill; that on the 10th of June, 1820, *Bridges* proved against the estate of *Cowell* a debt amounting to 143*l.* 18*s.* 3*d.*, including therein the sum of 50*l.*, the amount of the balance then remaining due on the bills of exchange so accepted by *Gillham*; that the three bills given by *Gillham* were duly paid on their arriving at maturity; that application was made to *Bridges* to consent to the expunging so much of his proof as related to the 50*l.*, with which he refused to comply. The petition therefore prayed, that such sum of 50*l.* might be expunged from *Bridges*'s proof; and that he might pay the costs of the application.

Mr. *Bell* and Mr. *Lynch* for the petition.

Mr. *Montague* against the petition, stated, from the affidavit of *Bridges*, that other bills drawn by *Cowell* and

accepted by various persons, had been discounted by him at the same time with the one accepted by *Gillham*, amounting in all to the sum of 237*l.* 13*s.*, all which were placed to the credit side, and the discount thereof to the debit side of *Cowell's* general account with the deponent ; that the whole of the bills were dishonored when they arrived at maturity, and their several amounts carried to the debit side of *Cowell's* account, who had a short time before become bankrupt, and the balance due to the deponent on the general account, including such bills and other monies paid on account of *Cowell* before the bankruptcy, amounted to 252*l.* 18*s.* 3*d.*, which by subsequent payments from *Gillham* and the sale of securities delivered to him by *Cowell* had been reduced to 143*l.* 18*s.* 3*d.*, which had been proved as for money lent, which, in point of fact it was, subject only to the security of the said bills, as far as they might become available ; and contended, that as the proof was upon the debt and not upon the bills, the creditor was entitled to receive dividends upon the whole debt proved until he was paid the full amount ; and that he had a right to apply what he had received in reduction of the general balance.

1823.

Ex parte
BARRATT.
In the matter
of
COWELL.

The VICE-CHANCELLOR.

The law considers each discount transaction as a distinct isolated transaction ; and though the form of proof be upon the loan, the proof is in truth upon each bill separately. Upon this principle, I must order the 50*l.* to be expunged. The commissioners were right in admitting the proof, including the amount of the outstanding bills which might not have been paid.

Ordered, without costs.

The costs of the assignees out of the bankrupt's estate.

1823.

V. C.
LINC. INN.
July 31.

Ex parte GEE and MILNES.—In the matter of
GEE.

Surety paying
the debt after
proof by the
creditor under
the commission
is entitled to
stand in the
place of the
creditor for the
debt paid, not
only in respect
of dividends,
but of the cer-
tificate.

THIS was a petition by the bankrupt, and *Milnes* a creditor. The commission issued against *Gee* in January, 1820, under which *Allan* and *Kendall* proved a debt of 2271*l.* 11*s.* 5*d.* At the time of making such proof *Allan* and *Kendall* held, as a security for part of such sum, the guarantee of the petitioner *Milnes*, for 1000*l.*, upon which 967*l.* 5*s.* 0*d.* had been paid by *Milnes* since the proof, being the whole sum due to *Allan* and *Kendall* on the said guarantee. The bankrupt passed his final examination, and obtained signatures to his certificate more than sufficient in number, but deficient in value, and *Allan* and *Kendall* had refused to sign the same, and had declared they never would sign it. The petitioner *Milnes* was desirous of signing the certificate for such sum of 967*l.* 5*s.* so paid by him, which was more than sufficient to perfect the same; but upon application to *Allan* and *Kendall* to consent that the proof made by them should be reduced, by deducting such sum, in order that the petitioner, *Milnes*, might prove the same in his own right, they refused so to do, and were thereby enabled to prevent the petitioner, *Gee*, from obtaining his certificate. The petition therefore prayed, that the proof made by *Allan* and *Kendall* might be reduced by the sum of 967*l.* 5*s.*, and that the petitioner, *Milnes*, might be at liberty to prove the same under the commission, and receive dividends thereon, and to sign the certificate in respect thereof; or otherwise, that the petitioner, *Milnes*, might be at liberty to sign the certificate, in respect of the sum of 967*l.*, part of such proof

already made, in the same manner as if he had made a proof for that sum.

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Ex parte
GEE.

In the matter
of
GEE.*

Mr. *Montagu* for the petition.

The assignees and Messrs. *Allan* and *Kendall* had been served with the petition, but did not appear.

The VICE-CHANCELLOR.

I feel some difficulty in framing an order within the language of the statute (a), so as to meet the justice of the case. The legislature does not seem to have contemplated a case of this nature: the surety paying after proof made is thereby allowed to stand in the place of the creditor having proved, in respect of dividends; and where proof has not already been made by the creditor, the power of proving is given to the surety, but there is no provision respecting the certificate. The hardship of the present case, however, convinces me, that it will not be going beyond the spirit of the act to hold, that all the rights of the creditor proving should be vested in the surety who pays after the bankruptcy, and that he shall stand in the creditor's place, not only with respect to dividends, but in respect of the certificate.

The order was "That the petitioner, *Milnes*, be admitted to stand in the place of the said *John Allan* and *John Kendall*, as to the sum of 967*l.* 5*s.*, and receive dividends thereon, and be at liberty to assent to or dissent from the allowance and confirmation of the said certificate; unless it should appear to the commissioners that there was any deduction to be made from

(a) 49 G. 3. c. 121, s. 8.

1823. the claim of *Milnes*, in which case he was to stand in
 — the place of *Allan* and *Kendall* for the difference, after
Ex parte such deduction; and that the sum so deducted should
GEE. In the matter be expunged from the proof on the proceedings."
 of
GEE.

LINC. INN. *Ex parte* PATON.—In the matter of DUNSMURE
 Aug. 1. and GARDNER.

Interest subsequent to the commission cannot be charged upon the estate directly or indirectly, except in case of surplus.

THIS petition by the assignees, stated that on the 24th of May, 1808, a commission issued against *Dunsmure* and *Gardner*; that on the 22d of October, 1808, the Renfrewshire banking company proved a debt under the commission, of 2030*l.*, upon six several bills of exchange, each of them respectively drawn by *Inglis* upon, and accepted by the bankrupts, payable at different dates, to the order of *Inglis*, which were discounted by, and indorsed to such banking company; that such bills were, as regarded the bankrupt, accommodation bills: that in November 1811, a dividend of 2*s.* in the pound was declared, and the Renfrewshire banking company received 203*l.* upon such proof of 2030*l.*; that after the payment of such sum, the petitioner discovered that the banking company had received at different times from *Inglis* the drawer, the whole, or nearly the whole, of such sum of 2030*l.* due thereon; and on being applied to for a statement of money so received, returned the following account of money received from *Inglis*, and the balance due on the bills of exchange, exclusive of the 203*l.* received upon the bankrupt's estate:

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Vol. I. Dr. Mr. David Inglis in Account with the Renfrewshire Banking Company. Cr.

1810, Aug. 11. <i>Dunsmuir and Gardiner to D. Inglis.</i>	£ s. d.	1808, April 4. By cash from Mr. Inglis	£ s. d.
Account sd May 1808	360 0 0	1808, April 12. Interest to date	677 16 6
Ditto 16th July	315 0 0	17. Cash from Mr. Inglis	54 11 11
Ditto ditto	340 0 0	May 15. Ditto ditto	100 0 0
Ditto 30th	360 0 0	June 16. Ditto ditto	100 0 0
Ditto 16th August	330 0 0	July 14. Ditto ditto	100 0 0
Ditto ditto	335 0 0	Aug. 15. Ditto ditto	100 0 0
Protests, charges, and interest, } per statement sent him - }	272 9 10	Sept. 15. Ditto ditto	100 0 0
		Oct. 4. Ditto ditto	100 0 0
		1810, April 11. Interest to date	496 14 0
		Aug. 11. Ditto ditto	71 16 7
		Balance due to the Renfrew Banking } Company }	51 8 9
			390 2 1
			2502 9 10
1810, Aug. 11. To balance	390 2 1		
Interest	6 14 10		
	396 16 11		

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Ex parte
PATON.
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of
DUNSMUIR.

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of
DUNSMURE.

The petition further stated, that from the balance of 396*l.* 16*s.* 11*d.*, the dividend of 203*l.* being deducted, a balance of 193*l.* 16*s.* 11*d.* was left, as appearing due to the banking company in respect of the said bills of exchange, and which, together with the interest thereon down to the present time, was claimed against the bankrupt's estate; that it appeared from the statement, that a considerable part of such balance of 396*l.* 16*s.* 11*d.* was constituted by the banking company having charged the sum of 272*l.* 9*s.* 10*d.* for interest on the said bills of exchange, which accrued since the date of the commission; and that they had already received from *Ingliš* and from the bankrupt's estate, more than sufficient to discharge the said principal sum of 2030*l.*, and the petitioner therefore submitted that the proof ought to be expunged: and that in case the Renfrewshire banking house should be allowed interest on the principal money in the manner claimed, then that they were not entitled to receive a dividend on the bankrupt's estate on the whole of such bills of exchange, until the said 2030*l.* and interest thereon should be satisfied, but that each of such bills ought to be considered as a distinct and separate proof, and be expunged therefrom, as they respectively became discharged by the payments made in respect of the said debt; and that the Renfrewshire banking company were entitled to a dividend on such bills of exchange only as should be then remaining unsatisfied. The petition therefore prayed, that the said proof might be expunged, or otherwise that the same might be reduced by striking out so many of the said several bills of exchange as should appear to have been satisfied by the payments already made in respect of such debt.

The facts in the petition were admitted; but by the affidavits of *Alexander Dunlop*, a partner in the Renfrew-

shire banking company, as to the course of dealings in respect of the bills of exchange and the payments from *Inglis*, it was stated that the said several sums so credited in the account were not paid by the said *David Inglis* specifically in payment or on account of any particular bill or bills accepted by the said bankrupt, but generally on account of such bills; and that no one or more of such bills had yet, in the judgment of deponent, been paid in full.

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Ex parte
PATON.
In the matter
of
DUNSMURE.

Mr. *Montagu*, for the petition, contended that this was clearly a case where interest on the acceptances beyond the date of the commission could not be claimed; certainly not as against the bankrupt's estate directly; nor was there any thing in the circumstances of the case to give such right indirectly through the medium of *Inglis*; that it was not like the case of a mortgage, where a person having a valuable security might work out interest up to the very moment of payment.

Mr. *Horne*, against the petition, called the attention of the Court to the statement of accounts set out in the petition. It purports to be, as it in fact is, the respondents' account with *Inglis* their customer, and not with the assignees of *Dunsmure*, and the debtor side of it is composed of the several bills accepted by the bankrupt, upon which proof was made, and a sum of 272*l.* 9*s.* 10*d.* "for protests, charges, and interest, as per statement delivered to *Inglis*." These sums, it is submitted, are correctly carried to the debit of *Inglis*, though in an account with the bankrupt's estate, interest subsequent to the bankruptcy could not be charged. The payments subsequently received by the banking company were received, not in respect of any particular bill, but in diminution of the general account, and this too from

1823.
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Ex parte
 PATON.
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 of
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the drawer of such bills, and not from the person primarily liable. As between the Renfrewshire Banking Company and *Inglis*, they have an undoubted right to debit him with expenses and interest on the bills until they are paid in full: and the first question which arises on the petition is, whether, having in stating their account with *Inglis* debited him with such charges and interest, and credited him with the sums received, the assignees of the acceptors can oblige the respondents to give credit for sums received on their account from a third person, and, at the same time, exclude charges to which such third person was clearly liable. The principle that interest cannot be charged subsequent to the commission is undisputed, but it has never been decided that a creditor, receiving interest from a third person liable to interest, is bound to give credit for sums so received as interest, and consider them as between such creditor and the bankrupt's estate as payment of so much of the principal. In *Ex parte De Tastet*, in the matter of *Corson* (a), proof was made upon acceptances to the amount of 1364*l.*, discounted for a third person, who was the drawer and indorser; and although such drawer afterwards, by bills and other payments, reduced the debt to 420*l.*, still the whole amount of the bills was allowed to be proved. *Ex parte Martin*, 2 *Rose*, 87. The principle is not varied by the fact alleged in the petition, that these bills, as between *Inglis* and the bankrupt, were mere accommodation bills. The assignees in such case would have an equity after the debt was paid to prevent any further dividends being drawn from the estate for the benefit of *Inglis*.

(a) 1 *Rose*, 10.

Then as to the alternative prayed by the petition, that, if not wholly expunged, the proof may be reduced by the exclusion of so many of the bills as shall appear to be satisfied, that cannot be sustained, unless it is proved, and the *onus* of such proof lies upon the assignees, that the payments from *Inglis* were made specifically in discharge of any particular bills, and not in reduction of the general balance, as has been sworn by the respondents. The present case is clearly distinguishable from *Ex parte Burn (a)*, inasmuch as there the bills were indorsed and paid by the bankrupt himself, and not by a third person.

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Ex parte
PATON.
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of
DUNSMURE.

The VICE-CHANCELLOR.

Aug. 1.

A creditor receiving a sum in part payment has a right to apply it to the payment of interest before he applies it in reduction of principal: but in the present case, as between the creditor and the bankrupt's estate, the interest clearly cannot be brought into the account. All sums received from *Inglis* must be credited as payments on account of the principal due on the bills: as interest, however, cannot be debited on one side of the account, it must not be credited on the other. Exclude interest on both sides, and let the account stand for the difference.

The order directed "That it appearing from the account produced, that the Renfrewshire Banking Company had, upon the whole, received from *David Inglis* several sums to the amount of 1774*l.* 10*s.* 6*d.*, which reduced the said proof to the sum of 259*l.* 9*s.* 6*d.*; and that they had also received from the bankrupt's estate

(a) 2 *Rose*, 55.

1823.
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Ex parte
 PATON.
 In the matter
 of
 DUNSMURE.

a dividend of two shillings in the pound on the original proof, which would reduce such proof to 52*l.* 9*s.* 6*d.*, the petitioner, as assignee, should pay to the Renfrewshire Banking Company such sum of 52*l.* 9*s.* 6*d.*, and that thereupon the proof should be expunged, without prejudice to the claim of the Renfrewshire Banking Company against the said *David Inglis* for the balance of interest and expences due by him in respect of such bills. (a)

LINC. INN. *Ex parte* MONTGOMERY and Others — In the
 Nov. 27, Matter of RUSSELL, DOUGLAS, and RUSSELL.
 1822.

Application by
 creditors to re-
 strain the as-
 signees from a
 sale of the
 bankrupt's
 stock in trade
 and lease.

MR. BLIGH, for the petitioners, applied for an order to restrain the assignees from proceeding to a sale of the stock in trade and lease of the shop and premises of the bankrupts. The petition stated, that a commission

(a) *Ex parte Gass re Stroz- bom*, 2d July 1823. Proof was made under the commission on bills of exchange accepted by the bankrupt for 996*l.*, part of a larger sum due from the bankrupt's son to the petitioner; the creditor had a further security from the bankrupt's son for the payment of the debt due to the petitioner. The debt due from the bankrupt's son at the date of the commission was 1070*l.* The further security extended to pay the full sum of 1070*l.*, but left

unpaid some interest subsequent to the commission. The question was, whether the petitioner could retain this interest out of the dividends on the 996*l.*

The Vice-Chancellor said, that interest subsequent to the commission could neither directly nor indirectly be thrown upon the bankrupts until all the creditors are paid twenty shillings in the pound; and the petition was dismissed with costs. Mr. Barber for the petition; Mr. Treslove for the assignees.

had issued against *Russell, Douglas, and Russell*, as partners: that on Saturday, the 23d of November instant, assignees had been chosen: that the assignees intended to sell the stock in trade and lease on this day: that they had not given any public notice of the sale by advertisement, but had sent notes and cards, to view the bankrupt's stock and premises, to a few of their own friends only: that the stock was valued at 10,000*l.*, and was divided into four lots, the first lot being valued at 5000*l.* prime cost.

1822.

Ex parte
MONTGOMERY
In the matter
of
RUSSELL.

Mr. *Bligh* contended that the interest of the bankrupts' creditors required that the sale should not take place so speedily, but that full notice should be given, and time afforded for the public to inspect; and that it was the belief of the petitioners, who had themselves only accidentally discovered that the sale was to take place, that the intention of the assignees was to favour their friends in the purchase of the stock, and submitted that the court should interfere to prevent injury to the creditors.

The LORD CHANCELLOR thought he ought not to interpose, unless some security were given to guarantee the assignees against any loss which might occur by preventing the sale in this summary mode, and asked whether the petitioners would give an indemnity to the assignees to make good any loss which might be caused by his interposition.

Mr. *Bligh*, after consulting with his clients, stated to his lordship that the petitioners were prepared to give such indemnity.

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 {
Ex parte
 MONTGOMERY
 In the matter
 of
 RUSSELL.

Nov. 28.

The LORD CHANCELLOR then made the order to stay the sale, upon the petitioners so indemnifying the assignees; with liberty to the petitioners, or the assignees, to apply to his Lordship as they might be advised.

Mr. *Horne* and Mr. *Rose*, on this day, upon notice given to the petitioners, moved, that so much of the order made by his lordship as went to stay the sale should be discharged with costs; and contended that it was not competent to the petitioners, admitting that they were joint creditors, to apply for such order, because, in proceeding to such sale, the assignees acted at their peril, and upon their responsibility, and the Court had never exercised such jurisdiction: and, secondly, that the petitioners did not shew by their petition, supposing the Court would exercise such jurisdiction, that they were entitled to apply for the order, there being no allegation in their petition that they were joint creditors of the bankrupts.

Mr. *Bligh*, against the motion, said, that the circumstances under which the sale was made were sufficient to authorise the Court to interfere, because, supposing the assignees to be responsible, there would necessarily be expense and delay to the creditors in ascertaining the extent of any loss which might arise; that he had now a sufficient case to induce the Court not to discharge the order, the petitioners having discovered that a person of the name of *Todd* had been in partnership with these three bankrupts, and that they had struck a docket, and bespoke a commission against the four, and the Court was always in the habit of supporting that commission which had the most extensive effect, as being the most beneficial for the creditors, that the present

had issued against *Russell, Douglas, and Russell*, as partners: that on Saturday, the 23d of November instant, assignees had been chosen: that the assignees intended to sell the stock in trade and lease on this day: that they had not given any public notice of the sale by advertisement, but had sent notes and cards, to view the bankrupt's stock and premises, to a few of their own friends only: that the stock was valued at 10,000*l.*, and was divided into four lots, the first lot being valued at 5000*l.* prime cost.

1822.

Ex parte
MONTGOMERY
In the matter
of
RUSSELL.

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Mr. *Bligh*, after consulting with his clients, stated to his lordship that the petitioners were prepared to give such indemnity.

1822. they have sworn upon striking the docket against the four, that they are joint creditors of the four, and consequently cannot be joint creditors of the three.

Ex parte
MORRIS. In the matter
of
RUSSELL.

Mr. *Bligh*. The petitioners have proved under the commission and voted in the choice of assignees: but the property is now found to be the property of the four.

The LORD CHANCELLOR.

That will avail nothing. The proof must be expunged. The oath you made upon striking the docket virtually expunges it. You cannot be creditors of the three and creditors of the four for the same debt: if the property be the property of the four, you have the remedy in your hands, by attending at the sale and stating to the purchasers that it is the property of the four. Let so much of the order as stayed the sale be discharged, and let the petitioners pay to the assignees the costs of this application.

V. C. *Ex parte* MATHEW.— In the matter of COOPER.
LINC. INN.
Aug. 1,
1823.

The commissioners have jurisdiction under the general order of March 1794, to

take an account of the expenses attending the sale of the mortgaged premises, and to tax the costs of all parties attending the sale.

IN this case, upon the application of a mortgagee of certain leasehold premises of the bankrupt, in pursuance of the general order of the 8th of March, 1794, the commissioners took an account of what was due and owing

to the mortgagee on his mortgage, and ordered the mortgaged premises to be put up for sale by auction: the premises were accordingly sold in pursuance of the order of the commissioners, and the assignment of the premises to the purchaser was executed, and the purchase-money was paid to the mortgagee.

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Ex parte
MATHEW.
In the matter
of
COOPER.

The purchase-money being applicable in the first place to the payment of the costs, charges, and expenses attending the sale, including the costs, charges, and expenses of the assignees, in respect thereof, they, the assignees, applied to the mortgagee for payment of such their costs, charges, and expenses, and the mortgagee refusing to pay the same, the assignees thereupon applied to the commissioners to take an account thereof; but the commissioners declined so to do, on the ground that they had not jurisdiction therein without an order from the Court for that purpose.

This petition by the assignee prayed, amongst other things, that an account might be taken by the commissioners of the costs, charges, and expenses of the assignees of, and attendant upon, and incident to the sale; and that the mortgagee might pay the amount thereof to the petitioners.

Mr. Agar and Mr. Duckworth for the petitioners.

Mr. Horne and Mr. Beames for the mortgagee.

The VICE-CHANCELLOR was of opinion, that it was the duty of the commissioners, under whose direction the sale was to take place, to ascertain the expenses of the sale, in execution of, and according to, the general order of March 1794.

1823.

Ex parte
MATHEW.
 In the matter
 of
COOPER.

It was ordered, that the commissioners should take an account of the expences attending the sale of the said mortgaged premises, and should tax the costs of all parties attending the sale, pursuant and according to the said general order.

V. C.
 LINC. INN.
 July 14.

No jurisdiction
 in bankruptcy
 to compel bank-
 rupt to perfect
 bill of sale of a
 ship.

Ex parte STEWART. — In the matter of O'BRIEN.

PETITION by vendee under a bill of sale of a ship, praying that the bankrupt might be ordered to perfect the sale by delivering up and endorsing the certificate of registry before the 19th of July, which would be within ten days after the return of the ship. (a)

Mr. *Lovat* for the petition.

Mr. *Montagu* against it.

Dixon v. Ewart, 3 Meriv. 322.; *Thompson v. Smith*, 1 Mad. 395. were cited.

The VICE-CHANCELLOR.

Although courts of equity will compel a party within the time to perfect the title by all necessary acts where it has jurisdiction, yet upon this petition I cannot do it: I cannot make this order in bankruptcy; first, because the bankrupt is a mere trustee; and next, because, if he were not a trustee, I could make no personal order upon

(a) See 34 G. 3. c. 68. s. 16.

him as to his property; and, thirdly, because the petitioner is a mere stranger to the commission.

1828.

Ex parte
STEWART.
In the matter
of
O'BRIEN.

By consent the bankrupt was ordered to deliver up to the petitioner the certificate of registry, and to sign the indorsement on the certificate, so as to perfect the title of the said ship; upon the petitioner undertaking to deal with the bill of sale as the Court should direct, the bankrupt to have his costs of the application.

Ex parte LOXLEY.—In the matter of LANGHAM. LINC. INN.
Aug. 7.

PETITION for payment of dividend on proof made; with interest and costs. Interest payable on a dividend at 5 per cent.

The question was, whether interest should be paid at 5 or 4 per cent.

Mr. Rose for the petition.

Mr. Horne, *contra*.

The VICE-CHANCELLOR ruled, that interest at 5 per cent. should be paid.

1823.

V. C.
LINC. INN.

Aug. 6.

Order of payment, where bankrupt's real estate is pledged, for securing an annuity.

Ex parte SLACK. — In the matter of JARMAN.

CERTAIN real estates of the bankrupt were pledged for the security of an annuity to the petitioners, and were, by an order of the Court, sold before the commissioners. There were arrears of the annuity due at the date of the commission, and arrears which had accrued subsequent to the commission.

It was ordered, that the purchase-money of these real estates should be first applied in payment of the costs of the application, the sale, and other proceedings incident thereto; and after payment of those costs, in or towards the payment of the arrears of the annuity due at the date of the commission, and of the value of the annuity as ascertained by the commissioners; and that proof should be made for the deficiency. (a)

Mr. *Farrer* for the petitioners.

Mr. *Ellison* for the assignees.

(a) Arrears subsequent to the commission are not the subject of proof: whether they would not be paid out of any surplus of the bankrupt's estate.

1822.

Ex parte O'FERRALL and Others.—In the matter of
GORDON.

V. C.
LINC. INN.
Dec. 23.

THIS petition, by the executors of *Edward Conolly*, stated, that in October 1820, the testator died, having by his will bequeathed the sum of 1000*l.* to the wife of *John Gordon*: that, at the time of the death of *Edward Conolly*, *Gordon* was indebted to him in the sum of 7357*l.*; that in May 1821, a commission issued against *Gordon*; that no part of the debt of 7357*l.* had been paid; that the petitioners had applied to the commissioners to be allowed to set off the legacy of 1000*l.*, after making a suitable provision for the wife of the bankrupt, and to prove for the remainder of the debt of 7357*l.*, which the commissioners refused; being of opinion that the petitioners were not entitled to set off any part of the legacy. The petition therefore prayed, that after making a suitable provision out of the said legacy for the wife of the bankrupt, the executors might be permitted to set off the residue of the legacy against the said debt of 7357*l.*, and to prove the remainder of the said debt under the commission.

Executors allowed to set off a moiety of a legacy given by their testator to the wife of the bankrupt against a debt due from the bankrupt to their testator.

The other moiety ordered to be settled on the wife for life, with remainder to the issue of the marriage.

Mr. *Montagu*, for the petition, relied upon *Ex parte Blagdon*, 2 *Rose*, 251.

Mr. *Wetherell* for the assignees.

The general rule is, that debts and credits to be set off must be due in the same rights: but a debt, whether legal or equitable, due to the husband and wife in right of the wife, is not in the same right as a debt due from the husband; and cannot be made a subject of set off

1822.

—
Ex parte
 O'FERRALL.
 In the matter
 of
 GORDON.

or mutual credit, unless under special circumstances. In *Carr v. Taylor*, 10 *Ves.* 579. judgment was given against the sett-off by an administrator. The same principle appears in *Ex parte Blagdon*.

The VICE-CHANCELLOR ordered, — That a moiety of the legacy of 1000*l.*, after payment thereof of the costs of the application, should be settled upon the wife for life, remainder to the issue of the marriage; and that the other moiety should be set off against the debt due from the bankrupt to the estate of *Conolly*; and that the petitioners should be at liberty to prove for the residue after such set off.

LINC. INN.
 July 4,
 1823.

Ex parte LAING. — In the matter of GOLDING.

Application to stay the certificate on the ground that the day of the month and year of the signature of the creditors was not inserted at the time, and that the affidavits of the parties witnessing their signatures did not state the time of such signatures, refused.

PETITION to stay the bankrupt's certificate. The petition, after alleging certain facts which ultimately were not pressed as a ground of relief, stated that the signatures by the greatest part of the creditors to the certificate of *Golding* were irregular and defective, and contrary to the Lord Chancellor's order (a); and that the four several affidavits of the signatures of the several creditors were also defective and irregular; that the twelve first creditors who signed the certificate had not subscribed or affixed opposite to their respective signatures the day of the month and year on which they so signed the same, but the several dates set opposite to

(a) Aug. 8, 1809.

such signatures were in the hand writing of the witnesses who saw the same signed, and not of the creditors themselves; that the several affidavits filed with the secretary of bankrupts in order to prove the subscription by the creditors, of their consent to the commissioners' signing and sealing the certificate, were defective, because they did not state that the several creditors had set and subscribed their respective names, the day of the month and year on which they had signed such consent: and in particular, that the affidavit of *Quilter* to the signature of *Golding*, a creditor, was defective, because it did not state the day of the month and year on which he signed the same; and therefore prayed that the certificate might be stayed.

1823.

Ex parte
LAING.
In the matter
of
GOLDING.

It was stated by the affidavit of *Claridge* who witnessed the signature of the creditors and also of the commissioners to the certificate, that the omission of the day of the month and year at the time when the creditors signed was through his inadvertence; that on his attendance upon the commissioners with the bankrupt's certificate to procure their signatures thereto, the commissioners noticed to the deponent the omission of the dates, and requested him to insert the day of the month and year when the creditors signed their names respectively; and that he had thereupon inserted such dates, which were known to him by means of daily memorandums, and written by him on a reference thereto; and the commissioners thereupon signed the certificate.

Mr. *Heald* and Mr. *Montagu* for the petition.

Mr. *Horne* and Mr. *Rose* against it.

It was argued that the order was merely directory.

1823.

Ex parte
LAING.
In the matter
of
GOLDING.

The VICE-CHANCELLOR did not think that the order required that the date of each creditor's signature should be inserted by the creditors themselves, providing they were added at the time; and that whether in the presence of the creditor or not was immaterial; but his Honor considered that the certificate was defective, inasmuch as the dates were not added at the time the creditors subscribed their names; and that the affidavits of the signature of the creditors were not such as were required by the Lord Chancellor's order, and such defect was now incurable, as the proper affidavits were required to precede the signature of the commissioners.

The certificate was ordered to be stayed.

From this decision the bankrupt appealed.

Aug. 6.
1824.

The LORD CHANCELLOR.

An occasional dispensation with the strict requisition of the order affords no reason for displacing the order altogether. It is within the discretion of the Court in what cases a strict compliance with the order is or is not to be required; and it was never the intention that the bankrupt should not have his certificate from the omission as to the signature or attestation of the signature of the certificate, if that omission be satisfactorily accounted for. It is the duty of the commissioners to require a strict attention to a compliance with the order; but I can never say that there should be no case in which, in the exercise of the judicial discretion committed to the Great Seal, an omission of this nature could be satisfactorily explained; but let it be recollected that the defect must be very satisfactorily explained. I think that, in this particular case, the omissions are so satisfactorily accounted for, that the certificate should be allowed.

1823.

Ex parte LONG. — In the matter of SYLVESTER.

V. C.
LINC. INN.
July 3.

PETITION to stay the bankrupt's certificate.

This petition was opposed, on the ground that there was no affidavit of service. An imperfect affidavit had been produced on the preceding day, and also a second affidavit to remedy the imperfection; and the petition was directed to stand over, to give the bankrupt time to answer the second affidavit. The petition was now mentioned again, it having been discovered that the second affidavit had not been filed when it was produced, nor until the following day; and

Affidavit of personal service of petition to stay certificate sworn, but not filed on the day of the hearing, treated under the circumstances as no affidavit and petition dismissed with costs.

Mr. *Montagu* and Mr. *Knight* insisted, that the second affidavit, under the circumstances, could not be used.

Mr. *Horne* and Mr. *Roots contra*, contended, that as the petition having been ordered to stand over could not be considered finally disposed of, the Court must be held to be still sitting upon the present petition, and in that case there could now be no objection to the validity of the affidavit.

The VICE-CHANCELLOR.

It appears to me that I ought to consider this case as if it had been known at the first hearing that the second affidavit was not filed. In such case the petitioner must have applied for time to file the second affidavit; and I should have permitted the petition to stand over for an hour, and should afterwards have directed it to stand

1823.

Ex parte

LONG.

In the matter
of

SYLVESTER.

over, to give the bankrupt time to answer the affidavit. The second affidavit not being filed at the time when the petition was adjourned, the bankrupt was justified in not having answered it; and I could not now proceed on that affidavit without giving the bankrupt a regular opportunity to answer it; and the question is, whether the petitioner is entitled to ask from the Court this further delay. To grant this delay would be to create a prejudice to the bankrupt, in consequence of the misrepresentation of the petitioner that his second affidavit was filed; and considering the jealousy with which the Court watches its proceeding to stay the certificate, it does not appear to me that I should be warranted in so doing: I must, therefore, dismiss this petition with costs, upon the ground that, at the hearing, there was no affidavit of service; and treat the second affidavit, which was not then filed, as no affidavit.

Petition dismissed with costs.

V. C.
July 3.

Ex parte WRIGHT. — In the matter of SYL-
VESTER.

Where certificate had been suspended by a petition presented to stay it, another petition to stay presented during its suspension, but after the expiration of three weeks from the notice in the Gazette: Held, not presented in time, and dismissed with costs.

THIS was another petition by other creditors in the same matter against the bankrupt's certificate, but it was not presented within the three weeks after the notice in the Gazette, and for that reason Mr. *Montagu* and Mr. *Knight* insisted, that it ought to be dismissed with costs; and cited *Ex parte Emmett*, 1 *Maddock*, 111.

from the notice in the Gazette: Held, not presented in time, and dismissed with costs.

Mr. *Horne* and Mr. *Roots* contended, that this petition did not come within the rule in such cases, because the certificate had been delayed until the presenting of this petition by another creditor, who had presented his petition within the three weeks.

1823.

Ex parte
WRIGHT.
In the matter
of
SYLVESTER.

The VICE-CHANCELLOR.

The rule respecting the limitation of petitions against certificates applies equally to all: they must all be considered as original independent petitions, and no petition to stay a certificate can be heard which is not presented on or before the day appointed for the allowance.

Petition dismissed with costs.

Ex parte WILKINSON.—In the Matter of WILKINSON.

V. C.
LINC. INW.
Aug. 4.

THIS petition purported to be signed by the petitioners "in the presence of *Thomas B. Cox*, their solicitor." The solicitors presenting the petition, as appeared by the indorsement on the petition, were *Rosser and Son*: it also appeared that *Thomas B. Cox* was, at the time of the attestation, a clerk in Messrs. *Rosser and Son's* office.

If the person attesting the signature of the petitioner under the general order of August 1809, is not the solicitor actually presenting the petition, he must state himself in his attestation to be the attorney, solicitor, or agent of the party signing in the matter of the petition.

Mr. *Montagu* objected that this attestation was not a compliance with the terms of the general order of the 12th of August, 1809.

Mr. *Horne* and Mr. *Rose contra*.

1823. The VICE-CHANCELLOR.

Ex parte
WILKINSON.
In the matter
of
WILKINSON.

The Lord Chancellor's order contains provisions applicable to two distinct cases: the one where the signature of the petitioner is attested by the solicitor actually presenting the petition, and where no particular form of attestation is prescribed: the other where the signature of the petitioner is attested by some person not being the solicitor actually presenting the petition, and such person is directed to state himself, in his attestation, to be attorney, solicitor, or agent of the party signing, in the matter of the petition. The solicitor who attests and also presents the petition need not, in his attestation, state himself to be solicitor in the matter of the petition (a), provided it appear elsewhere that he actually did present such petition. In this case, as appears by the indorsement on the petition, the person attesting is not the solicitor actually presenting the petition, and coming, therefore, within the terms of the last branch of the order, ought to have stated himself, in his attestation, to be attorney, solicitor, or agent of the party signing in the matter of the petition. The second part of the Lord Chancellor's order refers to cases where agents to solicitors in the country may be employed; and under that part the present case falls: The order in that case requires the witness specifically to state himself to be attorney, solicitor, or agent of the

(a) In *Ex parte Sir Thomas Champneys, re M^r Grath*, the attestation was in the following form: "Signed in the presence of *W. White*, solicitor to the petitioner;" and upon objection taken to this attestation, the

Vice-Chancellor held it sufficient, it appearing by the indorsement on the petition, that *White* was the solicitor actually presenting the petition. — Aug. 3, 1823.

party signing, in the matter of the petition. This is not here stated, neither did *Cox* present the petition: The attestation, therefore, is bad. (a).

1823.

Ex parte
WILKINSON.
In the matter
of
WILKINSON.

Ex parte BUXTON and JENKINSON.— In the
matter of THOMPSON,

V. C.
LINC. INN.
July 29.

THIS petition by the executors of *Hannah Thompson* stated, that *Hannah Thompson* had proved a debt of 189*l.* under the commission; that the bankrupt was seised of the reversion in fee simple expectant on the death of his mother, the said *Hannah Thompson*, of certain freehold lands and premises, subject to divers legacies payable thereout after the death of *Hannah Thompson*; that *Hannah Thompson*, in October 1810, joined the bankrupt in mortgaging the premises for 600*l.* lent and advanced to the bankrupt, and the bankrupt having omitted to pay the interest on the mortgage, *Hannah Thompson* had been compelled to pay the same; that in January 1819, the assignees had advertised the

Where bankrupt's reversionary estate was offered for sale by auction and 950*l.* bid, and the same was bought in for 1000*l.* upon a reserved bidding to that amount, and afterwards when reduced into possession sold for 510*l.*: Held, under the circumstances, not within the rule established in *Ex parte Lewis* so as to make the assignees liable for the difference.

(a) *Ex parte Cox*, in the matter of *Hall*, Aug. 6.; *Ex parte Thomason*, in the matter of *Burgess*, Aug. 6.; and *Ex parte Thomas*, in the matter of *Mauve*, Aug. 6.; were like decisions upon the same point. Where the attestation was, "Witness to the signature, *J. Mortlock*, solicitor," and the solicitor presenting the petition was *Bond*, the Vice-Chancellor held the attestation in every way insufficient, as it did not even state him to be solicitor to the petitioners, and as it did not specify whether he was witness to the signature of both, or of which of the two petitioners. In *Ex parte Hall*, re *Smith*, a partner signed a petition by the partnership name, the Vice-Chancellor held it insufficient.—Aug. 1823.

1823.

—
Ex parte
Buxton.
In the matter
of
Thompson.

bankrupt's reversionary interest for sale, subject to the mortgage, and 950*l.* had been offered at such sale, but that the premises were bought in for the sum of 1000*l.* by the solicitor under the commission; that by an order of this Court made in February 1821, on the petition of *Hannah Thompson*, it was directed that the assignees should proceed to a sale of the bankrupt's reversionary interest in the said premises; and that the monies to arise therefrom should be applied in payment of the said legacies, the said mortgage debt, and all such monies as *Hannah Thompson* had paid for interest on the said mortgage, and that the surplus should be applied for the benefit of the creditors; that *Hannah Thompson* died in May 1821; that the bankrupt's reversionary interest being then reduced into possession by the death of *Hannah Thompson*, was sold by auction in July 1822, for the sum of 510*l.*, subject to the legacies and mortgage, being 440*l.* less than had been offered for the bankrupt's reversionary interest. The petition therefore prayed, that the assignee and solicitor might be compelled to make good the difference between the sum for which the said premises had sold, and which had been so offered for the same at the time of the original sale, and might be charged with interest on the sum for which the estate was so bought in, from the time when it was so bought in until the resale.

By the affidavits in answer, it was stated that the assignee had instructed the solicitor to make a reserved bidding of 1000*l.* at the said original sale for the benefit of the creditors; and that, at such sale, notice was given of such reserved bidding; that the last bidding at such sale was for 950*l.* by *Wm. Tomlinson*, a person in indigent circumstances, who had been then lately discharged under the Insolvent Debtors' act; that *Tomlinson*, upon

being applied to, said he was bidding for *Wm. Butcher*, who being then present, said he would not take the estate if it was knocked down to *Tomlinson*; that the solicitor consulted with several of the principal creditors there present, and with their approbation, determined to make use of the reserved bidding, and the estate was accordingly bought in for 1000*l.*; that some time after such auction a meeting of the bankrupt's creditors was held, and that, at such meeting, the creditors were informed of the proceedings of such sale, and of such reserved bidding, and the said creditors expressed their approbation of the said reserved bidding and the conduct of the sale, and resolved that the bankrupt's interest in the premises should not be sold during the life of *Hannah Thompson*.

1823.

Ex parte
Buxton.
In the matter
of
Thompson.

Mr. Knight, for the petition, relied on *Ex parte Lewis*, in the matter of *Leonard*, ante, 69.

Mr. Bell and Mr. Bickersteth on the other side.

The VICE-CHANCELLOR concurred entirely in the rule adopted by the Lord Chancellor in *Ex parte Lewis*, but thought that this was not a bidding by the assignee within the rule there laid down, and that the subsequent proceedings were equivalent to the consent of the creditors.

1823.

V.C.
LINC. INN.
Aug. 7.

Debts due to a partnership, agreed, upon the dissolution, to belong to one of the partners without notice to the debtors: Held, upon the bankruptcy of the partners, to be in the order and disposition of the partnership and joint estate.

Ex parte USBORNE. — In the matter of BARKER.

BARKER and *Hudson* carried on business together as brewers in partnership. In September, 1820, an agreement was entered into for the dissolution of the partnership, and it was thereby agreed that the leasehold messuages and storehouses wherein the partnership business was carried on, together with the whole stock, debts, and effects of the partnership concern, should thenceforth belong to and become the property of *Hudson* alone, who was thenceforward to carry on the business on his own separate account, and *Hudson* undertook and agreed to take upon himself and to pay and discharge the several joint debts then due from the partnership. A notice, stating the dissolution of partnership by mutual agreement, and that all debts due to or from the concern, would be received and paid by *Hudson*, was inserted in the *London Gazette*. *Hudson*, in pursuance of the agreement, took possession of the leasehold messuages, storehouses, brewery, plant, stock, and effects of the late partnership, and continued to carry on the business on his own separate account. In November, 1820, a joint commission issued against *Barker* and *Hudson*, at the date of which the petitioner was a joint creditor of the late copartnership, for the sum of 180*l.*, and a separate creditor of *Hudson*, for goods sold and delivered since the dissolution of partnership, to the amount of 303*l.*; and the petitioner accordingly proved such sums against the joint and separate estates respectively. At a meeting for declaring a dividend, the assignees alleged, that they were unable to decide or distinguish whether the leasehold messuages, storehouses, plant, stock, debts, and effects of the brewery, were to be considered and

distributed as part of the joint estate of the bankrupts, or as part of the separate estate of *Hudson*, the same having been claimed by the joint creditors as joint property, and by the separate creditors as the separate property of *Hudson*. The commissioners declined to give any direction as to the distribution, or to order a dividend without an order of the Court.

1823.

Es parte
USBORNE.
In the matter
of
BANKER.

Upon a petition that the commissioners might be directed to order a dividend, and that it might be declared, whether, under the circumstances aforesaid, the leasehold messuages, and stonehouses, plant, stock, debts, and effects of the late copartnership, were to be considered, at the time of issuing the commission, as the separate estate of *Hudson*, or the joint estate of the bankrupts, in respect of their late partnership, and that the same might be distributed accordingly; and that the separate property and effects of *Hudson*, acquired since the dissolution of the partnership, might be applied and distributed first in satisfaction of the separate debts due from him, his Honor the Vice-Chancellor was pleased to order, that it should be referred to the commissioners, to take an account of the joint and separate estates, and to keep distinct accounts of each, with liberty to state all special circumstances.

The commissioners, by their report dated 19th July 1823, after having certified amongst other things the dissolution of the partnership, and terms of the agreement thereupon as above stated, proceeded, "and we find that the said assignees have received the sum of 1650*l.* on account of the debts due and owing to the said bankrupts, previous to the dissolution of their said partnership on the 18th of September 1820; and at the request of the joint and separate creditors, we further

1823.

Ex parte
USBORNE.
 In the matter
 of
BARKER.

certify that it does not appear that any notice was given to the several joint debtors of the said partnership of the said agreement made between the bankrupts on the said 18th September 1820, except the said notice published in the London Gazette as aforesaid." The report continued as follows: " Under the circumstances hereinbefore stated, we are of opinion that the said leasehold premises, plant, stock, debts, and effects, became the separate property of the said *Francis Hudson*."

This was a petition by a joint creditor praying that the report of the commissioners might be confirmed in all particulars, except so far as related to the opinion or declaration of the commissioners, that the said joint debts became the separate property of the said *Hudson*, and that it might be declared that such joint debts remained, and were at the issuing of the commission, the joint estate of the said bankrupts.

Mr. *Horne*, for the petition, cited *Ex parte Burton*, in the matter of *Fossett*, ante, 207.

Mr. *Heald*, for the assignees, submitted to the direction of the Court.

The VICE-CHANCELLOR.

This is a case exactly within the principle of *Ex parte Burton*, in the matter of *Fossett*. The commissioners have themselves in one part of their report, by stating that no notice had been given to the debtors to the firm other than the advertisements in the Gazette, furnished me with reason for excepting to their opinion; and declaring that the debts owing by those debtors who had not notice of the agreement between *Barker* and *Hudson* remained in

the order and disposition of the partnership at the time of the bankruptcy, and form part of the joint estate.

1823.

Ex parte
USORNE.
In the matter
of
BARKER.

The order declared that the certificate of the commissioners, bearing date the 19th July 1823, should be confirmed, except so far as related to the opinion of the commissioners that the joint debts of the bankrupts became the separate property of *Francis Hudson*; and it was further declared that such debts so due and owing to the said bankrupts in respect of their then said copartnership remained and were at the date and suing forth of the joint commission, in the order and disposition of the bankrupts; and that the leasehold messuages, plant, stock, and other effects of the said bankrupts having been so transferred and delivered to the said *Francis Hudson* prior to the date of the commission, were the separate estate of *Hudson*. The costs occasioned by the present application to be borne by the two estates in equal moieties.

Ex parte LUKE.—In the matter of EVANS.

Aug. 1823.
May 1824.

THIS commission issued on the 24th of May 1822, upon the petition of *John Nesbitt*. The adjudication was not made until the 15th February 1823, and no order had been obtained for the commissioners to proceed in the commission. This petition, by judgment creditors of the bankrupt, who had taken out execution against the bankrupt's effects, on the 17th of May 1822, was presented in May 1823, and prayed that the commission might be superseded on the ground of the delay.

Commission superseded after a delay of nine months, though the delay was occasioned by the acts of the bankrupts, and was with the concurrence of the creditors.

1823.

Ex parte
LUKE.
In the matter
of
EVANS.

It appeared by the affidavits in answer that the commission had been taken out for the purpose of overreaching the execution of the petitioners; and that after the commission issued the bankrupt had called a meeting of his creditors, and had, at such meeting, urged them not to proceed in the commission, until he had had an opportunity of consulting his friends, and prevailing upon them to make a specific offer to the creditors of a composition: that in consequence of such urgency of the bankrupt, the petitioning creditor did not proceed in the prosecution of the commission; that the effects of the bankrupt being advertised for sale under the execution on the 28th May 1822, another meeting of the creditors took place, when the bankrupt informed them that his friends would come forward and make a proposition to the creditors, and the petitioning creditor was induced, at the special instance of the bankrupt, and with the concurrence of the creditors, to postpone the opening of the commission; that notice of the act of bankruptcy and commission was given to the petitioners, who nevertheless proceeded in the sale; that after the sale the bankrupt offered 5s. in the pound, upon the debts, on condition of the commission not being proceeded in; that the creditors having consented to that proposal, the petitioning creditor, with their concurrence did not proceed; but that the bankrupt being unable to carry such proposal into effect, the petitioning creditor, at the request of the creditors, proceeded in the commission, which was opened on the 10th of February 1823; and the bankruptcy declared on the 15th of February, that assignees had been chosen, the bankrupt had passed his last examination, and an action of trover commenced against the petitioners for the recovery of the property seized on under

the execution. The bankrupt obtained his certificate on the 2d of May 1823.

1823.

Mr. *Heald* and Mr. *Rose* for the petition.

Ex parte
LUKE.
In the matter
of
EVANS.

Mr. *Wingfield* and Mr. *Montagu* for the assignees, one of whom was petitioning creditor, contended that this case differed from those where the application was to supersede before adjudication, as in *Ex parte Smith*, 2 *Rose* 33.; or where the petitioning creditor was the cause of the delay, which may be considered as the ground of the decision in *Ex parte Puleston*, 2 *P. Wms.* 545., that here the petitioning creditor was wholly innocent; that the delay was occasioned by the bankrupt, and was sanctioned by the creditors; and as it was a point of discretion in the court, there was no reason why the interest of the creditors should be sacrificed for the benefit of an adverse creditor, and cited *Harrison's case*, 3 *V. & B.* 174. 1 *M. B.L.* 651; and *Ex parte Knight*, 2 *Rose*, 319.

The VICE-CHANCELLOR.

Aug. 5.

A commission is a proceeding for the immediate administration of the estate, for the benefit of all the creditors; and the party suing out the commission is bound to reasonable diligence, and the public, as well as the creditors, have an interest that there should be no delay in the prosecution of a commission, because such delay permits the bankrupt to remain in apparent credit. The commission must, therefore, be superseded, the present petitioners being no party to the delay. I consider the language of the Lord Chancellor, in the case that has been cited, to apply to delay happening through the bankrupt against the will of the petitioning creditor, as by the bankrupt concealing a necessary witness.

1823.

Ex parte
LUKE.
In the matter
of
EVANS.

May 11,
1824.

The assignees appealed, and the question was argued on the same grounds before the Lord Chancellor, by Mr. *Montagu* and Mr. *Glyn*, for the appellants, and Mr. *Heald* and Mr. *Rose* for the respondents.

The LORD CHANCELLOR.

I think that the Vice-Chancellor, has, under the circumstances of this case, properly exercised the discretion of the court. It is a well established principle, that when the petitioning creditor wilfully delays the prosecution of the commission, it will be superseded. It has not been contended the delay here was not wilful, and it is not a sufficient reason that it was at the request of the bankrupt, and with the concurrence of the creditors. Had the bankrupt and his creditors been the only parties concerned, it might have altered the case, but here the public was interested; for, till the bankruptcy was declared, the bankrupt was a person with whom all the world, ostensibly, and yet nobody, in reality, could deal. As to the objection, that superseding the commission will give validity to the execution to the injury of the creditors in general; the petitioning creditor, and the rest, who derive their rights through him, cannot now complain, that having once secured to themselves the right which the law gives them, of dispossessing the execution creditor, by taking advantage of an act of bankruptcy prior to the execution, and having by their own laches forfeited such advantage, the execution creditor is thereby restored to his original rights.

Commission superseded.

1823.

Ex parte MAUGHAN and SMITH.—In the matter
of WELLER.

L. C.
LINC. INN.
Nov. 6.

MAUGHAN and *Smith* were the petitioning creditors in this commission. *Maughan* was a creditor of *Weller* for 96*l.* 5*s.* 6*d.*, and *Smith* was a creditor for 53*l.* 14*s.* 6*d.* Each of them gave a separate bond to the great seal, in the penalty of 300*l.* and joined in an affidavit, each speaking as to his own debt. Upon carrying this affidavit to the bankrupt office, the docket was struck, and the commission bespoke: but the officer afterwards discovering that *Smith's* debt was, by mistake, stated in the affidavit as being 53*l.* 4*s.* 6*d.*, objected to make out the commission, unless new bonds were executed, and new affidavits sworn, upon the ground that otherwise the affidavits would be subsequent, in point of date, to the bonds, which it was said would be fatal to the commission.

Where in a joint affidavit by two petitioning creditors upon striking the docket, the amount of one of the debts was incorrectly stated, it was ordered that a supplemental affidavit should be made without new bonds. It is not necessary that the bond and affidavit should be of the same date.

Mr. *Beames* now moved, that the Lord Chancellor would direct the commission to issue on a new affidavit, without new bonds, observing, that there was nothing in the statute 5 G. 2. c. 30. s. 23., or any of the bankrupt statutes, or in the decisions upon it, that countenanced the doctrine of the officer.

The LORD CHANCELLOR, after observing that it usually happened that the affidavit and the bond were of the same date, said, that it was by no means necessary they should be of the same date; and directed the commission to issue without new bonds, and that *Smith*,

1823.

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Ex parte
 MAUGHAN.
 In the matter
 of
 WELLER.

by a separate supplemental affidavit, should correct the mistake in the original affidavit, *Maughan* being absent from London.

L. C.
 LINC. INN.
 Nov. 22.

Ex parte WOOLLEY and Others.—In the matter of
 DOWMAN and OFFLEY.

Commissioners ordered forthwith to execute the assignment to the petitioners who had been elected assignees by the major part in value of the creditors who had proved, and voted, where the meeting had been adjourned by the commissioners for the purpose of investigating a claim not sufficient to turn the choice.

THE petition stated that the commission issued on the 1st of November 1823, that on the 15th of November the petitioners were elected assignees, by creditors to the amount of 3396*l.*, and signed the usual memorandum of their acceptance of the trust; that at the close of the meeting, and after the petitioners had been so elected, Messrs. *Jennings* and *Berry* applied to prove a debt of 1703*l.*, which was opposed on the ground, that the bankrupts had given a warrant of attorney for 4000*l.*, upon which Messrs. *Jennings* and *Berry* had, on the 4th of October 1823, issued execution against the bankrupt's property, and levied the sum of 4000*l.*; that they, Messrs. *Jennings* and *Berry* had also, on the eve of the commission, obtained goods from the bankrupt to the amount of 1597*l.*, which had been entered in the books of the bankrupts under false dates, for the purpose of defrauding the creditors; that the commissioners thereupon postponed the consideration of the proof of such debt, to afford time to make further enquiry, and declared the choice of assignees adjourned until the 29th of November; that the petitioners submitted to the commissioners, as the fact was, that the amount of debt tendered by Messrs. *Jennings* and *Berry* was not sufficient

to affect the choice which had actually been made: that they had tendered the assignment to the commissioners, who refused to execute it: that the refusal of the commissioners to execute such assignment would be productive of great injury to the bankrupt's estate: that the petitioners were advised that the execution levied by Messrs. *Jennings* and *Berry* might be set aside by an application to the Court of King's Bench: that it was the intention of the petitioners to make an application for that purpose, but that by the refusal of the commissioners to execute the assignment, they would be prevented from so doing without the interposition of the Court, and would lose the benefit of the then present term: that no provisional assignee had been appointed, and the estate was suffering great loss in consequence of the inability of the petitioners to act; and, therefore, praying that the petitioners might be declared duly elected assignees; and that the commissioners might be directed forthwith to execute the assignment to them accordingly, and that the costs of the application might be paid out of the estate.

1823.

Ex parte
WOOLLEY.
In the matter
of
DOWMAN,

By the affidavit in answer it was stated, that the commissioners had adjourned the choice of assignees, as well as the proof of the debt of Messrs. *Jennings* and *Berry*, from the 15th of November to the 29th of November, in order to give time for the investigation of that debt, so that Messrs. *Jennings* and *Berry* might not be shut out from voting in the choice, in respect of such debt as they might be found entitled to prove.

Mr. Hart and *Mr. Montagu* for the petition.

Mr. Shadwell and *Mr. Rose*, *contra*.

1823.

The LORD CHANCELLOR.

Ex parte
 WOOLLEY.
 In the matter
 of
 DOWMAN.

Whatever pretence there might be to postpone the choice of assignees, had Messrs. *Jennings* and *Berry's* debt been one of preponderating amount, and tendered at a proper time, I can see none whatever, under the existing circumstances. The commissioners are generally bound to render effective the choice of the creditors, by immediately enabling the persons chosen to act for the benefit of the estate. I will not say that there may not be cases where such discretion may be exercised: I express no opinion on the subject; but in the present case I must say, that the commissioners ought not to have thus suspended the administration of the estate, and, therefore, order, that the commissioners do forthwith execute to the petitioners an assignment of the bankrupt's estate, pursuant to the act of Parliament.

L. C. *Ex parte* FORSHAW, LEECE, and BANNER,
 LINC. INN. Executors of the last Will and Testament of WIL-
 Nov. 12. LIAM RAMSBOTTOM.—In the matter of HOR-
 ROCKS.

Ex parte HORROCKS.—In the matter of HOR-
 ROCKS.

Application for
 the amendment
 of the commis-
 sion and peti-
 tion refused.

THIS commission, which was dated the 3d of October 1821, issued on a debt due from the bankrupt to *Forshaw, Leece, and Banner*, as executors of *Ramsbottom*. The affidavit of debt was made by *Forshaw*, and stated

the debt to be due to himself, and *Leece*, and *Banner*, as such executors: the bond, which was prepared in the country by the solicitor who took out the commission, was executed by *Forshaw* only, and was conditioned to prove the bankrupt indebted to *Forshaw* alone: the petition recited that the bankrupt was indebted to *Forshaw* only, and the commission stated, that *Horrocks* had become bankrupt, "with intent to defraud and hinder *Forshaw* and others, his creditors, of their just debts."

1823.

Ex parte
FORSHAW.

In the matter
of.

HORROCKS.

The bankrupt brought an action against the messenger for the purpose of impeaching the commission, and upon the trial of that action a verdict was given for the Defendant. The bankrupt having obtained a rule absolute for a new trial; upon the second trial the bankrupt obtained a verdict, on the ground of the incorrectness of the petition and commission, the proof of a debt to the three, as executors, not according with the petition and commission.

The first petition, by the three executors, prayed; that the commission and petition might be amended, by inserting the names of the petitioners, *Leece* and *Banner*; the petitioners offering to execute a new bond; or that a new commission might issue, of the same date as the former commission; or that the petitioners might be at liberty to sue out a new commission.

The second petition was by the bankrupt, and prayed a supersedeas of the commission, at the expence of *Forshaw*, *Leece*, and *Banner*, some, or one of them.

It appeared that the error in the commission and petition was known to the solicitor who took out the commission, before the first trial.

1823.

Ex parte
FORSHAW.
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HORROCKS.

Mr. *Cullen* and Mr. *Rose*, for the first petition, submitted, that the mistake in the commission and petition having arisen from the act of the officer, brought the case within the decision of *Ex parte Guthrie*, *supra*, 245. (a)

Mr. *Montagu* and Mr. *Glyn*, for the bankrupt, distinguished this case from *Ex parte Guthrie*, inasmuch as here the incorrectness of the commission and petition arose from the error of the solicitor who drew up the bond, and insisted that the commission, after having been in operation for two years, could not be amended, and that the concealment of this fatal defect in the commission by the solicitor of the petitioners during the whole of the investigation, and the burthensome expence which had been incurred in contesting the commission known not to be maintainable, did not call for the indulgence of another commission.

The LORD CHANCELLOR refused to order the commission and petition to be amended, and directed the commission to be superseded at the expence of *Forshaw*, *Leese*, and *Banner*.

(a) The question of the right of the secretary of the Norwich Union Society to sue out a commission by virtue of the powers given him by the act of parliament, *ante*, 247, note (a), was ar-

gued upon a special case before the Judges of the Court of King's Bench, who decided that he was not authorised to take out a commission. — 14th July 1824.

1823.

WALKER's Case.

L. C.
LINC. INN.
Nov. 25.

IN February 1823 the bankrupt was committed by the commissioners for not answering satisfactorily.

The warrant of commitment, after setting out a declaration which the bankrupt had delivered, accounting for certain deficiencies, proceeded: "Whereupon we, the said commissioners, did cause the following question to be propounded to him the said *Edmund Walker*. 'Is the above (meaning the aforesaid declaration of the said *Edmund Walker* on oath), all the account you can or will give of this two hundred pounds (thereby meaning the aforesaid two hundred sovereigns), which you admit to have received?' To which question so put by us as aforesaid, the said *Edmund Walker* refused to give any other than the following answer, that is to say, 'It is the only account I can give;' which answer of the said *Edmund Walker* not being satisfactory," &c.

The bankrupt was this day brought up by writ of *Nov. 25.*
habeas corpus.

Mr. *Montagu* submitted that the bankrupt ought to be discharged, that as no other examination relating to the subject was set out or referred to, the commissioners must be understood to have put that individual question only, without either repetition or modification; and until the bankrupt had, by his answers to their further examinations, given reason to suspect concealment or prevarication, a direct answer to a single question must be taken to be satisfactory.

1823.
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Mr. *Heald*, *contra*, contended that the suspicious nature of the explanation alluded to in the commissioners' question, coupled with his refusal to give any other answer respecting the transaction than that which was contained in the explanation itself, and which the commissioners were convinced in their own minds was replete with fraud and falsehood, was sufficient to warrant the commissioners in their present commitment.

THE LORD CHANCELLOR.

I must look at the record strictly. Of the commissioners' private reasons for suspicion I have no means of judging. The answer to the question — literally the question — here set out, with which the commissioners declare themselves dissatisfied, and upon which they commit the bankrupt, is direct, and from what appears upon the warrant, (and I have no other means of forming an opinion,) satisfactory. I must hold that a single question, followed by a direct answer, which question is unvaried in terms, and not followed up by any further examination respecting the transaction which may have excited the suspicions of the commissioners, can never afford grounds for a valid commitment: and for this reason alone, if there were no others, that the Judge who may afterwards have to decide upon such commitment, having no means of determining that the answer is unsatisfactory, must of necessity determine that it is satisfactory.

Let the bankrupt be discharged.

1824.

TOMLIN's Case.

L. C.
LINC. INN.
Jan. 19.

TOMLINS the bankrupt was committed by the commissioners on the 15th of August 1823 for not answering to their satisfaction. On the 27th of October 1823 he was again examined before the commissioners, and re-committed. The warrant for the last-mentioned commitment, after setting out the previous warrant, proceeded, "that various questions were now put to the said bankrupt, and amongst others, the following," &c.

The whole of the questions and answers should be set out in the warrant of commitment.

The bankrupt being this day brought up by writ of habeas corpus,

Mr. *Montagu* contended that the warrant was defective; that in all cases of commitment, whether of commitment in the first instance, or of re-commitment, the warrant should contain the whole of the examinations, that the Court might judge how far the answers given were satisfactory or unsatisfactory.

Mr. *Twiss*, *contra*, contended that the examinations not inserted in the warrant must be presumed to be irrelevant, and upon matters having no bearing upon the subject of commitment.

The LORD CHANCELLOR.

It cannot be inferred in this, if in any case of this nature inference is to be admitted, that the questions alluded to in the expression, "amongst others," had no relation to the subject of the commitment. The presumption on the contrary is, that they have such re-

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TOMLIN'S
Case.

lation. It ought not to be left to the commissioners to select such parts of the examinations alone as are unsatisfactory to them. The Judge who may afterwards have to decide upon such examinations cannot be supposed to have the same means of forming an opinion of the bankrupt's conduct as the commissioners who have personally investigated such conduct; and for this reason it becomes still more necessary to set out the whole of the examinations upon the warrant, since that is the only source from which the Judge is to extract information whereupon to form his opinion.

The bankrupt was discharged.

*Ex parte Mander
Re Mugginton
15th R. (2d) 856*

L. C.
LINC. INN.
January.

Ex parte SILLITOE and Ex parte HUNTER. —
In the matter of GOODCHILDS and Co.

Where two partners of a larger banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of monies procured for the benefit of the aggregate firm, on the credit of the indorsement of the separate firm, the Lord Chancellor

held that no proof could be

made on behalf of the firm of the two against the aggregate firm in respect of that debt.

Where one or more partners of a larger firm carry on a separate trade, proof is admissible on behalf of the separate trade against the aggregate firm only in respect of dealings between trade and trade.

JOHN GOODCHILD the elder, *John Jackson, William Jackson, John Goodchild* the younger, *James Jackson* and *Thomas Jones*, carried on the business of bankers at Bishop Wearmouth, under the firm of *Goodchilds, Jackson and Co.*, and in London, under the firm of *Jackson, Goodchilds and Co.* That branch of the banking business which was carried on in London, was conducted by *John* and *William Jackson*, the partners resident in London. *John* and *William Jackson* also carried on the business of ironmongers in London, under the firm of *John* and *William Jackson* on their separate account.

The Bishop Wearmouth or Sunderland branch of the bank was in the habit of drawing and circulating bills of exchange to a large amount, drawn upon, and accepted by the London firm. The Sunderland firm was also in the habit of making remittances to the London firm of bills of exchange, to be applied in payment of the bills so accepted; and it generally happened, for several years previous to the bankruptcy, that the outstanding bills of exchange so drawn upon and accepted by the London firm, greatly exceeded the amount of such remittances, and a large proportion of such bills accepted by the London firm, became due before an equal amount of the remittances was payable. It being contrary to the custom of the London bankers to indorse bills of exchange for the purpose of discounting them, and the governor and company of the bank of England having refused, on *John Jackson's* application to them for that purpose, to open a discount account with the London firm of the bank, the London firm was unable, upon the credit of its own indorsement, to convert such remittances into money, and was under the necessity of resorting to other means for procuring them to be discounted and converting them into money, and for raising monies by discount and otherwise, in order to meet their said acceptances; and therefore, with the knowledge and acquiescence of all the partners in the bank, the ironmongery concern of *John and William Jackson*, which had a discount account with the bank of England, was in the constant practice of indorsing such of the remittances as required to be converted into money before they arrived at maturity, and procuring them to be discounted by the bank of England, or by their private bankers, or other persons upon the credit of such indorsement of the ironmongery firm of *John and William Jackson*; and when other monies were required for the

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Ex parte
 SILLITON.

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 of
 GOODCHILDS
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use of the London firm to enable them to honour their acceptances, the same were raised by the ironmongery firm of *John and William Jackson* drawing bills of exchange upon various persons in London, and by indorsing and procuring them to be discounted. A regular debtor and creditor account of these transactions was entered in the respective books of the banking firm in London, and the ironmongery firm.

It appeared from the evidence furnished by the books of the banking establishment carried on at Bishop Wearmouth, under the firm of *Goodchilds, Jackson and Co.*, and in London, under the firm of *Jacksons, Goodchilds and Co.*, that it was the constant practice to credit the firm of *Jacksons, Goodchilds and Co.*, with the amount of all bills of exchange, &c., drawn by the Sunderland firm on the house in London, and to debit the house in London for all bills and sums of money remitted thereto by the Sunderland firm: that it was also the practice of *John and William Jackson*, the managing partners in London, to transmit to the Sunderland house a monthly account of all such bills and sums of money remitted to, and of all payments made by them, as such managing partners; which account was headed, "Dr. Messrs. *Goodchilds, Jackson and Co.*, in account with Messrs. *Jacksons, Goodchilds and Co. Cr.;*" that the books of the banking establishment kept at Bishop Wearmouth, comprised in one account all the several transactions of the said *John Jackson and William Jackson*, relating to the discounting of the several bills of exchange so remitted to them, and of all other bills and monies paid by them on account of the banking business, as also an account of all monies from time to time carried to the debit and credit of *John Jackson and William Jackson*, as partners in the banking establish-

ment; and it appeared that no dealings or transactions ever took place between such banking establishment and the firm of *John and William Jackson* in their separate trade as ironmongers.

1824.

Ex parte
SOLLITOR.
In the matter
of
Goodchilds
and Co.

In November 1815, a commission issued against all the partners. Upon a statement of accounts between the ironmongery firm of *John and William Jackson*, and the banking firm of *Jackson, Goodchilds and Co.*, in respect of the said bill transactions, it appeared that the sum of 8222*l.* was due from the banking firm to the ironmongery firm; for which sum proof was tendered on behalf of the ironmongery firm, but rejected by the commissioners.

This was an appeal from a decision of his Honor, *Aug. 1823.* the Vice-Chancellor, who was of opinion, that no substantial distinction could be made between a loan of money or sale of goods by a minor partnership to the aggregate firm, and that this case came within the principle, under which proof has been made by smaller firms: and by an order dated August 2d, 1823, had directed that such sum of 8222*l.* should be proved against the estate of *Goodchilds, Jackson and Co.*

Mr. Montagu and *Mr. Meggison* for the assignees of *Goodchilds, Jackson and Co.* The rule in cases of bankruptcy is clear, that a partner cannot prove against the joint estate of the partnership in competition with the joint creditors, and that a firm cannot prove against the separate estate of a member of the firm, in competition with the separate creditors: there are, however, two cases of exception to that rule, the first (which does not apply to the present case) is, where property is fraudulently taken from the joint estate to augment the

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Ex parte
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 of
 GOSWELL
 and Co.

separate estate, or from the separate estate to augment the joint estate; the second where there is a minor partnership or house of trade constituted of persons who are members of a larger firm, and there are distinct dealings between the distinct houses of trade. There is no pretence in the present case for supposing that there had been any fraudulent taking within the first class of excepted cases, and the facts will shew that there have not been any distinct dealings between distinct houses of trade, so as to come within the principle of the second class of excepted cases. It was not a dealing between the bankers and the ironmongers, for *John and William Jackson*, resident in London, were only part of the banking firm, and wheels, as it were, of the same machine. The law upon the subject is clearly stated in the case of *Shakeshaft and Co.*, in citing which in *Ex parte St. Barbe*, 11 Ves. 414., the Lord Chancellor says, "In the case of *Shakeshaft, Stirrup, and Salisbury*, Lord Thurlow went upon this distinction, — that where there is only one partnership arranging different concerns belonging to them all, in different ways for the benefit of different parts of that joint concern, as in that instance the three partners carrying on the business of cotton manufactures in Lancashire, and two of them in London, there could not be proof by the three against the two: but if the trades be perfectly distinct, then the three, as cotton manufacturers in Lancashire, might be creditors upon the separate concern of the two as ironmongers in London." All the later cases upon the subject, which are as follows, confirm this doctrine. *Ex parte Ring*, 1796, *Cooke*, 534; *Ex parte Freeman*, 1796, *Cooke*, 534; *Ex parte Johns*, 1804, *Cooke*, 534; *Ex parte Heslam*, 1810, 1 *Rose*, 146; *Ex parte Adams re Stewart*, 1813, 1 *Rose*, 305. The result of all the cases is, that the proof is admitted only in respect of a dealing in a dis-

tinct trade. That this right of proof must be confined to distinct dealings in distinct trades is obvious, from the consideration, that if not so confined, the general rule that a partner cannot prove against a firm would virtually be superseded: in this case there was no dealings by the banking firm with the ironmongery firm in articles of ironmongery, all the dealings were in bills; the bank of England requiring other names on the bills besides *Jackson, Goodchild and Co., John and William Jackson* put their names upon the bills for the purpose of giving the colour of a distinct credit, and thus procuring them to be discounted. Suppose that *John Jackson* alone, carrying on some separate trade and having separate creditors, had put his single name upon the bills or lent money to the aggregate firm, no proof could have been made in respect thereof against the firm. What difference could it make that two members of the firm, carrying on a distinct trade, lent money to the firm? If, indeed, the partnership trade had to purchase wools, for instance, from other persons for the purposes of such trade, and one of the partners being a separate dealer in wool sold to his firm, then the court would relax the present rule; there, if the partnership had not bought of the member in the firm, they must have bought of some other tradesman. Questions of this sort must be determined with reference to the nature of the dealings. If ironmongery had been supplied, there would have been a clear title to prove, as being clearly referable to their distinct character of ironmongers; but a supply of money must be referred to their character of bankers, and not to their separate trade. It is not that the money procured for the banking firm is supplied out of the ironmongery funds, but only that the name of the ironmongery firm is put upon the bills for the general benefit of the aggregate firm; where there is

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Ex parte
SULLIVAN.
 In the matter
 of
Goodchild
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of
GOODCHILD
and Co.

a supply of goods by the minor firm, there is a reputed ownership in respect of debts contracted in the course of such ostensible dealings of that separate partnership; but if a hundred pounds were lent by one partner carrying on a separate trade as coal owner to the firm of which he was member, instead of one hundred pounds worth of coal, no proof could be made. In all the cases cited, there were distinct dealings by the minor partnership in its separate commodities with the more extensive firm.

Mr. Hart, Mr. Shadwell, and Mr. Raithby on the other side.

This is a case of distinct and separate dealings within the established exception. The Durham firm drew upon the London firm, and for the purpose of enabling the London house to answer those drafts, the Durham house remitted drafts made payable in London, which had been paid to them by their country customers, and which were then indorsed by *John* and *William Jackson* in their separate firm, in order that they might be able to discount those drafts at the bank of England, and thereby raise money to meet the drafts of the Durham house. The effect of their transactions was, that the money supplied for the purpose of meeting the drafts drawn by the Durham house, was supplied, not by *John* and *William Jackson* as individuals, and as parts of the aggregate firm, but by means of the credit of the separate ironmongery firm of *John* and *William Jackson*. It was a pledge of the ironmongery assets to aid the general partnership; upon the faith of the indorsement of the ironmongery firm, and upon that alone, the bank of England discounted the remitted drafts. These country bills, when remitted, were not in a fruitful state, they re-

quired the incubation of *John and William Jackson* to make them productive in the London market. It is admitted, that if the firm of *John and William Jackson* had sold goods to the aggregate firm, the proof might have been made: a supply of money raised by means, or on the credit of the goods of the separate firm, would be equivalent to a supply of goods, and equally within the principle, though in the latter case it might be more difficult to furnish evidence of the fact. This was not a loan of money by the firm of two, but a pledge of the effects of the ironmongery partnership, in order to raise money for the general firm. Even a loan of money, if clearly made out to be a loan of the monies of the minor partnership, accepted by the aggregate partnership, and treated as such in the books of both, would be within the principle; provided the aid was given *bonâ fide* by the one firm, through its separate means or credit to the other firm, it would not signify whether the aid was in the shape of goods, money, or security.

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The Lord Chancellor took time to consider the case, and directed the secretary of bankrupts to attend him with the original orders made in the cases cited.

The LORD CHANCELLOR.

Jan. 20.

It appears to me to be necessary in deciding this case to be well informed of the principle upon which the question turns, and the extent to which the decisions are to be applied, and it is of the utmost moment that the uniformity of the principle to be applied here should be carefully preserved. We all know, who have had occasion to practise in this court since the year 1796, that nothing has been more perplexing than the application of this very principle; and if there is any thing

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In this case that might bring into question what has been considered as settled law, it is of the last importance that it should be reasoned and stated at large. The rule of the Court upon this point is founded upon principles so clear, that it would perhaps have been better that it should never have been departed from; but it has been departed from, and I feel no inclination to diminish or add to the exceptions. The rule is, that a partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors, shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself. To that rule there is an exception, manifestly founded in justice, and that is, where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership (an exception established in *Ex parte Kendall*, 1 Robt, 71., and other cases.) In this commercial country it has become of great importance to know what is to be done in cases where the same individual is to be considered as standing in many distinct characters, as member of several firms. If you look at the old law as to bills of exchange, you will find, that in older times it was found infinitely difficult to deal with paper to which a man was party in more characters than one. Now, to meet the more complicated nature of commercial relations, we say, that a man may be half a dozen men for the purpose of binding himself and benefiting others, and for that purpose may put his name upon bills in different characters, and may be a member of many partnership houses. These various relations originally came upon the Court with surprise, and presented great difficulties. I well remember the case of *Shakeshaft, Stirrup, and Salisbury*. (a) There were four or five persons in a partnership,

Rule

Exception

from precedent

from precedent

(a) Cited in *Ex parte St. Barbe*, 11 Ves. 414., stated 6 Ves. 125, 743, 747.

some of them carried on business in Liverpool, some in other places, and the credulous world took it for granted they were different concerns, though they were in fact only so many wheels of one machine. Another relaxation of the rule was therefore admitted, that where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted; but then the question what is a dealing in a distinct trade, is always to be looked at with great care. I apprehend that the principle does not apply more to two persons who happen to be constituent members of a partnership of six, than to one or each of the six, if one or each was a distinct trader. I take it to be quite clear, that if an individual partner has nothing more to say than this, that he has lent 100l. to his partnership, the strict rule immediately applies to him, and shuts him out from the benefit of proof: if it were sufficient to state that the partner would not have lent the 100l. but as a separate trader, the rule is at an end. We are not, therefore, merely to consider the question, whether *John and William Jackson* were partners as ironmongers; but whether this is to be considered a transaction between trade and trade; and in looking at the circumstances with a view to that question, great care is necessary lest we establish a principle which might in its consequences be the destruction of the rule: and if it be supposed that Mr. *Goodchild*, or any individual of the six, had been a separate trader, coal-dealer or corn-dealer, and had with his separate monies retired a bill discounted at the Bank of England, is it to be said, that because he is a separate trader, that therefore the retiring of that bill is to make him a creditor to prove against the creditors of the partnership? and if that would not entitle the individual to prove, is there any distinction between the case of one separate trader and the case of two individuals who are

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SILLITOR.

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2 *Goodchild*
distinct trader

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separate traders in partnership? It is true, you must look at the whole series of transactions: but if Mr. *Goodchild* for ten years had been advancing money to his firm till he had advanced 5000*l.*, if you please, and that all the members of the firm had considered him as a creditor, and in their partnership books had stated him to be creditor for the money advanced, and in his books he had stated the partnership to be debtor to him, still the same principle that would not permit him to prove the 100*l.* would apply to the 5000*l.* The question, therefore, to be decided here, is, what is the principle upon which it can be said that the rule of law is to be relaxed in respect of the dealings of these two partners, because they were ironmongers, not dealing in the trade of ironmongers, not dealing in their separate articles, but dealing for the convenience of the general partnership, by advancing money to retire bills discounted by the Bank of England; where then is the distinction in this case which can be safely drawn, preserving all the decisions, to prevent the application of the general rule of law? — I think it will be found by reference to the original record of the cases that have been cited, that in those petitions the consideration for which the demand accrued is stated at length.

Jan. 24.

On this day the Lord Chancellor stated, that he had carefully examined all the cases relating to this question of proof by partners as separate traders, in competition with their joint creditors, and that they were all cases in which the articles of one trade had been furnished to another trade: that there was no case in which the exception had been allowed where money had been advanced to the partnership by one or more of the partners; and that his opinion was the proof could not be maintained.

The order of the Vice-chancellor was discharged.

1824.

Ex parte POUCHER.—In the matter of CABLE.

March.

IN the month of August, 1821, *Woods* obtained a verdict against *Cable* for 144*l.* 10*s.* in an action of assumpsit for goods sold and delivered. On the 19th of October 1821 a commission issued against *Cable*; on the 16th November 1821 *Woods* signed judgment upon the verdict, and taxed his costs at 50*l.*; making, with the 144*l.* 10*s.*, the amount of the judgment, the sum of 194*l.* 10*s.* *Woods* was admitted to prove the sum of 194*l.* 10*s.*; and this was a petition by two creditors to reduce the proof, by deducting the 50*l.*, the amount of the costs, on the ground, that judgment was not signed till after the bankruptcy of *Cable*; and that *Woods* might be ordered to refund the dividends received in respect of such proof.

Where in an action upon contract, the verdict is before and the judgment after the bankruptcy, the costs are proveable.

If the verdict as well as the judgment be after the bankruptcy, the costs are not proveable, though it seems they are barred by the certificate.

Mr. *Montagu*, for the petition.

Mr. *Roots*, against it.

The cases cited were *Longford v. Ellis*, cited in note to *Lewis v. Piercy*, 1 *H. Bl.* 29.; and in a note to 14 *East*, 202.; *Blandford v. Foote*, *Cowper*, 139.; *Walter v. Sherlock*, cited 3 *Wilson*, 272.; *Aylett v. Harford*, 2 *Blacks.* 1817.; *Hurst v. Mead*, 5 *T. R.* 365.; *Watts v. Hart*, 1 *Bos & Pull.* 134.; in the matter of *Charles*, 14 *East*, 197.; *Ex parte Hill*, 11 *Ves.* 646.; *Scott v. Ambrose*, 3 *M. & S.* 326.; *Vansandau v. Corsbie*, 3 *M. & S.* 13.; *Dimsdale v. Eames*, 2 *Bro. & Bing.* 8. and 4 *Moore*, 350.; *Ex parte Todd*, 3 *Wilson*; *Walker v. Barnes*, 1 *Marsh.* 346.; *Ex parte Eicke*, 1 *Glyn & J.* 261.; *Ex parte Haynes*, 1 *Glyn & J.* 107.; *Beeston v. White*, 7 *Price* 209. 3 *Barn. & Ald.* 18.

1824.

The VICE-CHANCELLOR. (a)

Ex parte
POUCHER.
In the matter
of
CABLE.
April 28.

I shall not attempt to reconcile the numerous decisions which have been pronounced upon this subject, and which have been commented upon at great length by the Lord Chancellor, in *Ex parte Hill*, but having considered them all with great attention I shall state only what appears to me to be the result of them. It seems to me, upon authority as well as upon principle, that where, in an action founded upon contract, there is a verdict before bankruptcy, and judgment afterwards, there the costs *de incremento*, are proveable, having in effect been incorporated with the existing debt by the verdict, though not ascertained in amount till the judgment, and that notwithstanding the case of *Longford v. Ellis*, which is indeed opposed by that of *Walker v. Sherlock*, there is in this respect a distinction between a verdict in tort and a verdict in contract; that in tort there is no debt whatever with which the costs can be incorporated until the judgment. I adopt the conclusion drawn by the Lord Chancellor, in *Ex parte Hill*, from his laborious and powerful discussion of all the authorities that, even in an action upon contract, if a verdict be not obtained till after the bankruptcy, the costs which result from the future verdict and judgment, are not proveable under the commission, and I incline strongly to the opinion, that the costs of all proceedings in an

(a) Judgment was given at the same time upon another petition, *Ex parte Parkinson, in the matter of Lawton*, where the same point arose upon a verdict in an action of assumpsit for goods sold and delivered, obtained before the commission, and judgment signed after the commission. In that case the commissioners had refused to admit the costs to be proved, and the petition was to be allowed to prove the costs.—Mr. Barber for the petition; Mr. Agar and Mr. Montagu against it.

action upon contract, which, for want of a previous verdict are not proveable under a commission, are yet barred by the certificate, together with the original debt.

1824.

Ex parte
POUCHER.

In the matter
of
CABLE.

Petition dismissed.

Ex parte WILKINSON and Others. — In the matter
of WILKINSON.

V. C.
LINC. INN.
March 31.

THIS was a petition by the bankrupt and several of his creditors, to supersede the commission, and it appearing that the bankrupt had not surrendered, the Vice-Chancellor dismissed the petition, with costs, as against all the petitioners except the bankrupt.

Ex parte GLANDFIELD. — In the matter of
GLANDFIELD.

LINC. INN.
April 1.

MR. ROSE objected that this petition was not within the jurisdiction, it being headed "In Chancery."

Mr. Heald and Mr. Willis, for the petition, contended that this was not an objection to the hearing of the petition: that in *Collins v. Nicholson*, 2 Taunt. 321., it was said in Chief Justice Mansfield's judgment, that proceedings by petition to the Chancellor were proceedings in Chancery; and there the word "petition" re-

1824. referred expressly to a petition in bankruptcy: that an order too had been made by the Lord Chancellor in this matter, which was an acknowledgment of the jurisdiction: that the petition was by the bankrupt, who was contesting the validity of the commission, and therefore the petition had not been styled "in bankruptcy."

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Ex parte
GLANDFIELD.
In the matter
of
GLANDFIELD.

It appeared that the order made by the Lord Chancellor was an order obtained *ex parte* for an injunction to restrain proceedings at law.

The VICE-CHANCELLOR.

I can make no order upon the present petition. The case in *Taunton* does not apply. The parties, however, are at liberty to amend their petition, and when it returns so amended, I shall order that the petition stand over, with liberty to the petitioner to try the validity of the commission at law. Some difficulties at first occurred to me as to relieving the respondents against the Lord Chancellor's injunction. I think, however, that the injunction is gone the moment an order is made upon the petition.

The petition was amended, and the order made accordingly.

1824.

Ex parte LLOYD and Others. — In the matter of
ABLETT.

V. C.
LINC. INN.
April 1, 6.

THE petition and affidavits stated that the petitioners *Lewis Lloyd, Samuel Jones Lloyd, Edward Lloyd, and John Tabor*, together with their late partner *William Jones*, had, up to the time of *William Jones's* death, and that subsequently the petitioners had acted as the bankers of the said *Ablett*, and had been in the habit of accepting and paying his bills, and of discounting for him other bills, and making to him large advances of money: that as security for any balance in respect of such banking account, together with interest thereon, *Ablett* deposited in the hands of the petitioners and their said late partner *William Jones*, title deeds relating to certain estates, under a verbal agreement that the estates should be a security for all advances to be made by the petitioners and *William Jones* to the bankrupt; that the said title deeds remained in the hands of the banking firm until the death of *William Jones*, which took place in December 1821; that after the death of *William Jones*, the said title deeds remaining in the hands of the petitioners, it was verbally agreed between them and *Ablett* that the title deeds should still remain in their hands, subject to the like claim, and upon the faith thereof the petitioners continued to act as his bankers, and to advance and pay money on his account, and the title deeds remained in their hands at the time of the issuing of this commission in April 1823, and that at the date thereof there was due from him to the petitioners in respect of such banking account the sum of 4532*l.* 13*s.* The petition therefore prayed that the estate and in-

Where title deeds are deposited by way of security with a firm upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement for the security of a new sum upon a change of partners.

1884.

Ex parte
ELOY.
 In the matter
 of
 ABLETT.

terest of the bankrupt in the premises comprised in the title deeds so deposited with the petitioners might be sold, and the proceeds applied in discharge of such balance.

Mr. Sugden and Mr. Parker, for the petitioners.

Mr. Cullen, *contra*, contended that lien could not be extended by parol to cover subsequent advances even between the same parties, and *a fortiori* it could not be extended to other parties by parol; that the original contract was with the partnership, including *William Jones*, and could only be applied specifically to a debt subsisting at the time of *William Jones's* death; that no part of the present debt did subsist at that time, but the whole had arisen upon dealings with the new firm, which, although continued under the same title, was perfectly distinct. *Ex parte Marsh*, 2 Rose, 239, and *Ex parte Hobson*, 2 Rose, 328; that *Ex parte Kensington*, 2 Ves. & Bea. 79, was an authority for the same principle, there having been in that case express evidence, that an extension of the lien in case of change in the firm was part of the original contract.

Mr. Sugden, in reply, denied that *Ex parte Kensington* warranted the principle contended for. The Lord Chancellor in that case says, "If from the affidavit and examination taken together, I can collect that what was originally deposited for one purpose should be held as deposited for another, with reference to the demand of the subsequent partners, that, though by parol, would be sufficient." In *Ex parte Langdon*, 17 Ves. 227, the Lord Chancellor held, that additional advances upon the faith of a security already pledged to

and in the possession of the lender, would be charged upon the security.

The Vice-Chancellor.

I was desirous to have an opportunity of carefully examining all the prior cases upon the subject, in order that I might be quite sure that I was not extending a principle which is in direct opposition to the wise provisions of the statute of frauds. There is authority sufficient to support the lien in the present case: in *Ex parte Kensington*, the Lord Chancellor expressly states that he had gone the length of holding, that where a deposit was originally for a particular purpose, that purpose might be enlarged by a subsequent parol agreement; and I take the effect of the judgment in *Ex parte Kensington* to be, that an agreement written or verbal (not being by deed,) may be extended by parol. The present case is plainly within the doctrine laid down by the Lord Chancellor, and the petitioners are entitled to the usual order.

1824.

*Ex parte
Lynn*
In the matter
of
Bankers.
April 6.

Ex parte ACKROYD and Others. — In the matter of
PULLAN.

V. C.
LINC. INN.
April 5.

THIS petition stated, that *Pullan* had been engaged in the business of a merchant, and also of a dyer; and in his business of merchant became indebted to the petitioners to the amount of 6200*l.*; that in March 1822, *Pullan* declined business as a merchant, but continued to carry

The proof of a debt which must at all events be due, is not to be rejected because there is a question to be tried between the bankrupt's es-

tate and the creditor, although it is proper that no dividend should be paid on that proof until the question be determined.

1824.

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Ex parte
ACKROYD.
In the matter
of
PULLAN.

on the business of a dyer until December 1822; that when *Pullan* so declined business as a merchant, he agreed with the petitioners and the other creditors, with whom he had dealt in his merchant's business, to pay them the full amount of their debts by instalments, at four, eight, twelve, and sixteen months with interest, and a memorandum to that effect was drawn and signed by several of the creditors; and for the first three instalments, *Pullan* gave his promissory notes to several of such creditors; that the first instalment became due in August 1822, and was duly paid to the petitioners and the others of such creditors; that the second instalment, which became due in December 1822, was not paid; that on the 15th of May, 1823, the commission issued, and the petitioners applied to prove their debts, and to vote in the choice of assignees: but such proofs were objected to, on the ground that the petitioners had received the first instalment after *Pullan* had committed an act of bankruptcy, and with notice of his insolvency, and that they ought not to prove until they had refunded the instalment received: and the commissioners rejected the proofs of the petitioners; that the petitioners had not, at the time of the payment of the first instalment, any notice of an act of bankruptcy, or that *Pullan* was insolvent, or had stopped payment, unless the consent of the petitioners to receive payment of their debts by instalments upon his retiring from the business of a merchant, was in law a stoppage of payment, and prayed that they, the petitioners, might be at liberty to prove their debts under the said commission; and that the assignees might be removed and a new choice made; and that the petitioners might be at liberty to vote in such choice.

It was stated, that the act of bankruptcy on which the

commission was founded, took place before the payment of the instalment.

1824.

Ex parte
ACKROYD.
In the matter
of
PULLAN.

Mr. *Montagu* and Mr. *Glyn*, for the petitioners, contended, the petitioners had no notice of the bankrupt's insolvency at the time of the receipt of the instalment, that though a proposition to pay by instalments, might in some cases be considered to be notice of insolvency within the 46 G. 3. c. 135.; yet, that it could not be so considered in this case, where a trader engaged in two separate trades, upon his retiring from one, proposes to pay all the debts of that trade by instalments; that it was not in the usual course of trade to have to pay the whole debts of a concern at once, and inability so to do, was not proof of insolvency, *Bayley v. Schofield*, 1 M. & S. 338; *Deaunes v. Noble*, 1 Meriv. 551; and that, supposing there was notice of insolvency, the petitioners were clearly entitled to prove the residue of their debts, and to vote in the choice; and were not to be precluded from such proof because the assignees might be entitled to recover from them the instalments paid, as to which the commissioners had no jurisdiction to enquire.

Mr. *Horne* and Mr. *Rose*, for the assignees, opposed the petition, on the ground that the proposition to pay by instalments was notice of the bankrupt's insolvency, and that the instalments being plainly recoverable by the assignees, the case of the petitioners resembled that of a person holding the bankrupt's security, who could not prove without giving his security.

The VICE-CHANCELLOR.

This case is not to be resembled to that of a creditor holding a security, for where a security is of a certain

1824.

Ex parte
Ackroyd.
In the matter
of
Pullen.

ascertained value, the creditor has clearly a right to retain it, and to prove for the residue of his debt. Here the assignees say the creditor has no right to retain the instalment, which they assert is the estate of the bankrupt; and the question is, whether these petitioners ought to have been excluded, by the rejection of their proofs, from the exercise of those rights which it must be admitted belong to them, at all events to the extent at least in which they sought to prove, because there is a question to be tried between them and the assignees, which the assignees in their discretion may or may not put into a course of trial, and at such time as they think fit, but which the creditors cannot initiate. It would be extremely fit that these creditors should not be permitted to receive a dividend from the bankrupt's estate, until the question as to the instalment is determined; but it cannot be reasonable, that pending a delay, which is in the power of the assignees, these creditors should be excluded, not only from voting in the choice of assignees, but from the reservation of dividends upon their debts, and from the right of assenting to or dissenting from the certificate. That is not a case, however, in which I can direct a new choice of assignees; the Court never directing such new choice, upon the ground of error in the commissioners, except where there has been substantially no choice: let the petitioners go before the commissioners, and prove such debts as they may be able to substantiate, without objection on the ground of the instalment paid to them.

1824.

Ex parte WOOLLEY and Others. — In the matter of
DOWNMAN and OFFLEY.

V. C.
LINC. INN.
April 9.

THIS petition by the assignees stated, that the commission issued in October, 1823; that Messrs. *Jennings* and *Berry*, on the 29th of November, 1823, had been admitted to prove a debt of 1565*l.*; that the said Messrs. *Jennings* and *Berry* had, shortly before the bankruptcy, fraudulently obtained property of the bankrupt, in preference to the other creditors; that they had issued execution, upon a warrant of attorney, and made a levy upon such execution; that *Jennings* was summoned by the commissioners upon the 14th of January, 1824, to be examined, and had notice to produce his books of account, and also an account of the dealings of them the said *Jennings* and *Berry* with the bankrupts during the year 1823, which account *Jennings* and *Berry* had promised to deliver before their debt was admitted to be proved and which promise was repeated at the time such proof was made, for the purpose of ascertaining the particular circumstances under which such preference was made; that *Jennings* had attended but refused to produce such books of account or to refer thereto; that without such production he was unable to give full and satisfactory explanation of the circumstances attending such fraudulent preference, and the petitioners could not effectually pursue their examination respecting the same; that the commissioners had not jurisdiction to compel the production and delivery thereof; and therefore prayed, that *Jennings* might be ordered to produce, at a meeting to be appointed for that purpose, all books of account, papers, writings and securities in his possession or under his control, that might in any manner relate to his dealings with the bankrupts, and that

Application to compel a creditor, taking benefit of the commission, to produce his books relating to his transactions with the bankrupts refused.

Where legislature gives authority to commissioners, and not power to punish disobedience to that authority the great seal will lend its aid, but not where legislature has given no authority upon the subject.

1824.

Ex parte
WOOLLEY.In the matter
of
DOWMAN.

he might give a full and fair account of such dealings, and pay the costs of the present application.

There were contradictory affidavits as to the allegation in the petition, that *Jennings* and *Berry* had, before they were allowed to prove their debt, and at the time when such proof was admitted, undertaken to deliver an account of their transactions with the bankrupts, and afterwards refused so to do, or to permit an inspection of their books.

Mr. *Horne* and Mr. *Montagu* submitted that this was a case which called for the interference of the Court, in aid of the jurisdiction of the commissioners, who had authority, under the statute, to examine the party, but not to compel the production of his books, in the present case the only means by which any effectual information respecting an important part of the bankrupt's transactions could be obtained; that the practice, where there was a suspicion of preference, was, not to admit the proof until the circumstances of suspicion had been examined into; that thus the commissioners had, indirectly, the power of compelling production of the books of a party claiming to prove, by refusing the proof till such evidence of the debt were adduced; that the necessity of the interference of the Court was strongly exemplified in the case of *Hurdy and Dale (a)*, where the party examined refused to bring his books with him, and as he professed his inability to answer any of the commissioners' questions without reference to such books, and the place of the meeting being several miles from his residence, an adjournment became necessary between each interrogatory; and thus was a power discovered of trifling with the commis-

(a) Before the Lord Chancellor in July 1822.

sioners, and wasting the estate: that in general the jurisdiction of the commissioners, as to a debt, ceases the moment it is admitted as a proof, and any further proceedings against such debt must be upon a petition to expunge: that in this case, however, the proof was only conditional, and in the nature of a claim entered, and could not be said to be complete till the creditor had performed his part of the agreement, which he now refuses to do: that the Court, therefore, would not protect him in the vantage ground which he had obtained by his own fraud.

1824.

Ex parte
WOOLLEY.
In the matter
of
DOWMAN.

Mr. Cullen, *contra*, relied on the contradiction to the allegation that any such agreement had been submitted to by Messrs. Jennings and Berry, and contended, that if any such right ever existed, which he denied, of requiring an exhibition of a creditor's books, the commissioners had waived such right, by admitting the proof, with which it was not now competent for them to interfere: that, under present circumstances, it rested entirely with the persons objecting to the validity of the proof to produce evidence against it, which by no analogy or practice was the creditor himself bound to produce, even supposing his own books contained such evidence.

The VICE-CHANCELLOR.

Wherever the legislature has given authority to the commissioners, but has not given to the commissioners power to punish disobedience to that authority, and to make the authority given available for its purpose, the great seal will lend the aid of its general jurisdiction to execute and enforce the provisions of the legislature. As where the statute gives the commissioners power to

1824.

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Ex parte
 WOOLLEY.
 In the matter
 of
 DOWMAN.

summon and examine witnesses respecting the bankrupt's estate, without giving them the power of compelling their attendance for the purpose of such examination (a), there the Court will interfere in aid of their jurisdiction, by enforcing the attendance of witnesses refusing to appear without such intervention: but where the legislature has given no authority to the commissioners upon any particular subject, this Court cannot give authority. The commissioners have, in the present case, either the complete power which this petition seeks, or they have no authority upon the subject. If by the sixteenth section of the 5 G. 2. c. 30. the legislature has given authority to the commissioners to require the production of books and papers, it has by the same section given power to the commissioners to punish disobedience to that authority by commitment, and the aid of the great seal is not necessary: and if the legislature has not, by that section, given that authority, then the great seal cannot give it; that would be, not to exercise, but to create a jurisdiction. There can be little doubt, however, that the assignees may, under that section of the statute, fully attain their object, because a general power to examine, as to a bankrupt's estate and dealings, will authorise an examination into the contents of books; and that general power is followed by power to commit. Then can the Court entertain the application in respect of any distinction arising out of the character of creditor: upon turning this point in my mind, upon which I had some doubt, I think that a creditor examined in respect of a debt he seeks to prove is in no different situation from any other person. The commissioners have indirectly the

(a) *Ex parte Levett*, *supra*, 185. 5 G. 2. c. 50. s. 6.

power to compel creditors to produce their books, and shew the nature of their transactions with the bankrupt, by refusing otherwise to receive the proof; but that indirect power could not be enforced by commitment. In the present case, the commissioners have parted with that power by admitting the proof: it is, however, alleged, that the proof was admitted on the condition that the creditor produced his books, which he might in the first instance have been compelled to do: if such a conditional admission had been satisfactorily made out, the question would have arisen, whether this Court should interfere to enforce it; but it does not seem to be established, and all I can now do is to decline making any order upon the petition.

1824.

Ex parte
WOOLLEY.

In the matter
of
• DOWMAN.

Ex parte TAYLOR and Others. — In the matter of
HERBERT the Younger.

V. C.
LINC. INN.
March and
April.

WILLIAM HERBERT the elder, the father of the bankrupt, proved a debt of 2925*l.* 8*s.* 4*d.* under the commission; after that proof, by an indenture dated the 6th of June 1823, and made between *William Herbert* the elder of the first part, the petitioners *Tatlock*, *Hogg*, *Gandolfi*, and *Filica*, and *Grimes* and *Goddard* of the second part, and the petitioner *Taylor* of the third part, reciting that *Herbert* the elder, as surety for the bankrupt, had become indebted to the petitioners *Tatlock* and *Hogg*, copartners, to the petitioners *Gandolfi* and *Filica*, also copartners, to the said *Grimes* and to the

A party who has proved a debt, and afterwards assigns it, cannot sign the certificate without the authority of the assignee.

A creditor accepting an assignment of a debt proved is substantially a creditor proving a debt within the 49 G. 3. c. 121. s. 14., and

thereby relinquishes an action brought by him against the bankrupt.

1824.

Ex parte
TAYLOR.In the matter
of
HERBERT.

said *Goddard*, in divers sums of money, and reciting that the said parties of the second part had agreed to release the said *William Herbert* the elder from their said debts upon his assigning to the petitioner *Taylor*, upon the trusts therein mentioned, the said sum of 2325*l.* 8*s.* 4*d.* or the dividends to arise thereon, the said *William Herbert* the elder assigned to the petitioner *Taylor*, his executors, administrators or assigns, the said sum of 2325*l.* 8*s.* 4*d.* and the dividends arising therefrom, upon trust, to divide the said sum, dividends, and proceeds, as the same should accrue, amongst the said parties of the second part in proportion to their several debts; and the said *William Herbert* the elder thereby appointed the petitioner *Taylor*, his executors and administrators, his lawful attorney, to recover and receive the said sum and the dividends thereon, and to give receipts for the same, and in the name of him the said *William Herbert* the elder or otherwise to bring any action or suit for the recovery thereof; and the said several persons, the parties thereto of the second part, thereby accepted the said sum and dividends thereby assigned in full satisfaction of their said debts, and thereby absolutely released the said *William Herbert* the elder from their said respective debts.

After the execution of that indenture, *William Herbert* the elder, without the direction or concurrence of the petitioner, or any of them, signed the bankrupt's certificate in respect of his said proof of 2325*l.* 8*s.* 4*d.*

This petition prayed that the name and signature of *William Herbert* the elder to the certificate might be erased, and the certificate stayed, and that the petitioner *Taylor* might be at liberty to assent to, or dissent from,

the allowance of the certificate in respect of the said debt of \$3251, 8s. 4d.

1824.

Ex parte
TAYLOR.
In the matter
of
HERBERT.

The *Solicitor-General* for the petition.

Mr. *Horne* and Mr. *Rose* for the bankrupt.

Ex parte Dubois, 1 *Cox*, 310.; *Powel v. Evans*, 5 *Ves.* 839.; *Ex parte Boulton*, 1 *M. B. L.* 333., were cited.

The VICE-CHANCELLOR.

The father has excluded himself by contract, and can have no right to affect the property. The signing of the certificate is an important act of administration as to the property assigned, and cannot be done without the authority of those who are entitled to the property under the assignment. Let this petition stand over for a fortnight, and in the mean time let the petitioner *Taylor* call a meeting of the persons interested under the trusts of the said indenture, for the purpose of taking their opinion as to the propriety of assenting to or dissenting from, the certificate of the bankrupt, and let the purpose of such meeting be previously communicated to every person interested under the indenture, and let what passes at such meeting, and also the opinions of the creditors who shall not attend it, be laid before the Court by affidavit.

It was ordered accordingly.

It appeared that *Grimes* and *Goddard*, two of the four creditors for whose benefit the debt was assigned, and who were not parties to the present petition, desired that the certificate should be signed, but their

April 10-

1824.
 —
Ex parte
 TAYLOR.
 In the matter
 of
 HERBERT.

debts not being equal in amount to the debts of the creditors who were petitioners, the Vice-Chancellor considered the petitioners as forming a majority against the certificate, and directed the signature of the father to be expunged from the certificate.

It appeared that *Gandolf* and *Filica*, two of the petitioners, had the bankrupt in custody for the debt due from the bankrupt to them, for which the father was surety; and it was now insisted that these creditors, by accepting the assignment of the father's proof, (of which acceptance the present petition was conclusive evidence,) were substantially creditors proving under the commission, and had therefore relinquished all benefit of their action, and ought to discharge the bankrupt from custody. The Vice-Chancellor was of that opinion, and ordered the bankrupt to be discharged.

LINC. INN.
 April 13.

Ex parte MARRABLE. — In the matter of
 BROWN.

Wine sold by the bankrupt remaining in the bankrupt's cellars, set apart in a particular bin and marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, not in the order and disposition of the bankrupt.

THE petition stated, that in April 1823, the petitioner purchased from *Brown*, a wine-merchant, a pipe of wine, which, according to agreement between them, was, for the petitioner's convenience, bottled and deposited in *Brown's* cellar; that the petitioner had paid for it, and that each of the bottles was sealed with the petitioner's seal, and the whole was set apart in a particular bin in *Brown's* cellars; that a memorandum, acknowledging the possession of such wine, was given by *Brown* to the petitioner, and an entry to the same effect made in *Brown's*

books; that about three weeks after the wine was so paid for and deposited as aforesaid, a commission issued against *Brown*, and the petitioner's application to have possession of the wine was refused by the assignees. The petition therefore prayed that the wine might be delivered up to the petitioner, and the costs of the petition.

1824.
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Ex parte
MARRABLE.
In the matter
of
BROWN.

Mr. *Montagu*, for the petition, contended, that the wine in question could not be considered in the reputed ownership of the bankrupt within the statute of *James*; it being expressly marked, so as to notify to the world that it was not the property of the bankrupt, who could not have exercised any right of ownership or disposition, without committing a fraud upon the petitioner.

Mr. *Roots*, *contra*, submitted, that this case was within the statute; that the wine was, to all appearance, part of the stock of the bankrupt, however it might be marked, and would be so included by the excise officer, who was not bound by any mark, purporting that the property was in any other than the actual possession.

The VICE-CHANCELLOR considered that the question would not be affected by reference to the acts of the officers of the excise; that this wine was not in the possession of the bankrupt, under such circumstances as to deceive his creditors, by the appearance of its forming part of that stock to which they might give credit; that the order and disposition of the wine was certainly not in the bankrupt, and very cautious provisions were made, that it should not have the appearance of being so; and therefore ordered it to be delivered up; but

Without costs.

1884.

V. C.

April 8..

Bankrupt is entitled to inspection of the proceedings for the purpose of ascertaining the debts proved, with a view to his certificate.

Ex parte MORGAN.—In the matter of MORGAN.

THIS was a petition by the bankrupt, and it stated, that he had passed his last examination, and had caused his certificate to be prepared for the signature of his creditors; and that the solicitor to the commission had refused to allow the petitioner to have access to the proceedings for the purpose of taking a list of the debts proved above 20*l.*, or to furnish the petitioner with such list, although the petitioner had offered and was willing to pay any reasonable charge for the same; that the assignee refused to interfere, or to give the petitioner any assistance in respect thereof; and it therefore prayed that the assignee and solicitor might be ordered forthwith to permit the petitioner to inspect the proceedings for the purpose aforesaid; or otherwise to furnish the petitioner with a list of the debts proved, and might pay the costs of the application.

Mr. *Rose* for the petition.

Mr. *Beames* for the assignee and solicitor.

It was conceded, that the bankrupt was entitled to the inspection for the purpose aforesaid; and the Vice-Chancellor ordered the assignee personally to pay the costs of the application, and that such costs should be allowed out of the bankrupt's estate.

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Ex parte GOLDSMITH and Others.—In the matter of EAGLE WILLETT and ROBERT WILLETT, and in the matter of KENT.

V. C.
LING. INN.
April 12.

IN February 1819 a commission issued against *John Kent*, under which commission the said *Eagle Willett* (then carrying on business as a banker at Thetford, in partnership with *Field Willett* and *Robert Willett*) and the petitioners were chosen assignees, and Sir *John Perring* and Co. were appointed the bankers to the commission. In May 1820 the petitioner *Goldsmit* paid to *Eagle Willett* the sum of 409*l.* 6*s.* 10*d.*, received by him on account of the estate of *Kent*, in order that *Eagle Willett* might remit the same to the bank of Sir *John Perring* and Co.; but *Eagle Willett*, instead of paying such sum to the house of *Perring* and Co., opened an account in the books of himself and partners, in their said bank at Thetford, and such sum of 409*l.* 6*s.* 10*d.* was placed to the credit of the assignees under *Kent's* commission in such account. In April 1823 a commission issued against the said *Eagle Willett*, *Field Willett*, and *Robert Willett*; and it being discovered that such sum of 409*l.* 6*s.* 10*d.* had been detained by *Eagle Willett*, contrary to the statutes 5 G. 2. c. 30., and 49 G. 3. c. 121., a proof was tendered against his separate estate of 572*l.* 1*s.* 4*d.*, being the sum of 409*l.* 6*s.* 10*d.* so retained, and 162*l.* 14*s.* 6*d.* for interest, at 20*l.* per cent. upon such sum: the commissioners declined to admit such proof, without the order of the Court, but permitted a claim to be entered for the same. This petition, therefore, prayed, that such

The 20*l.* per cent. given by the fourth section of the 49 G. 3. c. 121. applies to a solvent assignee only.

1824. sum of 572*l.* 1*s.* 4*d.*, for principal and interest, at 20*l.*
per cent., might be proved against the separate estate of
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 WILLETT. Mr. *Rose*, for the petition.

Mr. *Andrews*, for the assignees of *Willett*, submitted, that the fourth section of the stat. 49 G. 3. c. 121., upon which the present claim was founded, contained a penalty applicable only to solvent assignees, and that the sixth section applied to bankrupt assignees, and was not, as to them, cumulative on the penalty in the fourth section: that the assignees, therefore, in case of a co-assignee becoming bankrupt, could only prove the sum misapplied or detained, and legal interest, as in any other case of debt; and the statute had furnished another remedy in such case, by declaring that his certificate should protect his person alone, and not his future effects, against the difference between the amount of the dividends paid and the debt remaining: that to put a different construction on these sections would be to make that which was intended as a punishment of the bankrupt operate to his benefit.

The VICE-CHANCELLOR.

I must consider this as an employment of the money for the benefit of the bankrupt-assignee, and it is indifferent whether it is for his sole benefit or for the joint benefit of himself and others. I am of opinion that the fourth section which gives the 20*l.* *per cent.* against an assignee, is meant to apply by way of penalty against a solvent assignee only, and is not meant to prejudice the creditors of a bankrupt-assignee, and

that the sixth section imposes the penalty upon the bankrupt assignee.

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It was ordered, that the petitioner be at liberty to prove the sum of 409*l.* 6*s.* 10*d.*, together with interest thereon, at five *per cent. per ann.*, up to the date of the commission, against the separate estate of *Eagle Willett*.

Ex parte BROWN and BLUNDSTON.—In the matter of ANDREW and DAVID SALISBURY.

V. C.
LINC. INN.
April 13.

PREVIOUS to the issuing of the commission, *Andrew* and *David Salisbury* being indebted to the petitioners in the sum of 94*l.* 19*s.*, delivered to them as a security for that debt a promissory note for 100*l.*, made by *Murray* and *Kumale*, payable forty-eight months after date to *Andrew* and *David Salisbury* or their order. In May 1823, this commission issued. Afterwards the petitioners discovered that the said note had not been indorsed, and applied to the assignees under the commission and to the bankrupt to indorse the same; but the assignees had refused to indorse it, or to consent to the bankrupt's so doing: this petition therefore prayed, that the assignees or the bankrupt might be ordered to indorse such note, and that the costs of the application might be paid out of the bankrupt's estate.

The bankrupt having delivered a promissory note as a security for a debt less than the amount of the note, without indorsement, ordered that the creditor should be at liberty to bring action on note in the name of assignees, indemnifying them, and undertaking to account for surplus recovered. Petitioners to pay costs of petition as upon an agreement without writing.

Mr. *Montagu*, for the petition, cited *Ex parte Mowbray*, 1 Jac. & W. 428.

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Mr. *Spence*, for the assignees, consented to act under the direction of the Court. The assignees opposed that part of the prayer only which related to costs.

The VICE-CHANCELLOR.

This case differs from *Ex parte Mowbray*, where the whole beneficial interest was out of the bankrupt, and he had become a mere trustee; but here, by reason of the amount of the note being beyond the debt for which it was pledged, the legal interest in the note passes to the assignees. Let the petitioner be at liberty to use the name of the assignees in an action on the note, if an action be necessary, indemnifying the assignees in respect of such action, and undertaking to pay the surplus to the assignees, if the amount of the note be recovered; and if an action be not necessary, then let the assignees join in a receipt for the amount of the note on receiving the surplus. This is, in effect, a security from the bankrupt without an agreement in writing, the petitioner must therefore pay the assignees their costs of this petition.

It was ordered, that the petitioners be at liberty to use the names of the assignees in an action against the maker of the note, if necessary, and they should be so advised; or if the drawers of the note, or either of them, should be willing to pay without an action, then that the assignees should join in a receipt for the amount of the note to be paid to the petitioners on having the balance of the amount of the note beyond the sum of 94*l.* 19*s.* paid to them: and that the costs of the petitioners, and the costs of the assignees, of and occasioned by the present application, be paid out of the said sum of 94*l.* 19*s.*, to be first taxed, &c.: and that the peti-

tioners be at liberty to prove the amount of the costs, so paid, under the said commission, and be admitted creditors for what they should so prove.

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Es parte DYKES ALEXANDER, SAMUEL ALEXANDER the Younger, RICHARD DYKES ALEXANDER, and HENRY ALEXANDER.—
In the matter of TILLS.

V. C.
LINC. INN.
April 28.

PREVIOUS to the year 1805 *Samuel Alexander* the elder, *Dykes Alexander*, *John Spooner*, and *Samuel Alexander* the younger, carried on business as bankers at Ipswich, under the firm of *Alexander and Spooner*.

An agreement by way of deposit of title-deeds with a firm of five, one of whom was a nominal partner only, extended by subsequent agreement to the actual partnership of four.

In August 1805, *Samuel Alexander*, sen., withdrew from the partnership. In February 1806, *John Spooner* also withdrew from the firm, but his name was with his consent continued, and the business was conducted under the old style of *Alexander and Spooner*. In the year 1809 *Richard Dykes Alexander*, and in 1810 *Henry Alexander*, were admitted members of the partnership, which was thenceforward carried on under the firm of *Alexander, Spooner, and Alexander*; the real members being *Dykes Alexander*, *Samuel Alexander* the younger, *Richard Dykes Alexander*, and *Henry Alexander*.

On the 2d of November 1816, *Tills* executed a bond "to *Dykes Alexander*, *Samuel Alexander* the younger, *John Spooner*, *Richard Dykes Alexander*, and *Henry Alexander*," conditioned for the payment of the full sum or sums then due, or that might at any time thereafter

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be due to them in account, not exceeding in the whole the sum of 2000*l.* and interest, and at the same time, as further security, he deposited the title-deeds of certain premises, situate in Hutton in Suffolk, with the following memorandum indorsed upon the bond: "I *William Tills* have this day left with the within-named *Dykes Alexander*, *Samuel Alexander* the younger, *John Spooner*, *Richard Dykes Alexander*, and *Henry Alexander*, the title-deeds of certain premises, situate in Hutton in the county of Suffolk, which deeds I do hereby pledge as a collateral security for the due payment of the within obligation, and hereby authorize the said *Dykes Alexander*, *Samuel Alexander* the younger, *John Spooner*, *Richard Dykes Alexander*, and *Henry Alexander* to stand possessed thereof until the full payment or discharge of all monies due to them, or that may hereafter be due to them, as expressed by the within obligation. *W. Tills.*"

In June 1819, *John Spooner* died, and on the 16th of May 1821, *Tills* executed another bond to *Dykes Alexander*, *Samuel Alexander* the younger, *Richard Dykes Alexander*, and *Henry Alexander* conditioned for the payment of such sums of money as were then, or might thereafter, become due to them in account, not exceeding 1000*l.* and interest. At the time of executing the last-mentioned bond, *Tills* indorsed thereon the following memorandum:

"I hereby acknowledge the writings of my estate, situate in Hutton, to be left as a collateral security with *Dykes Alexander*, *Samuel Alexander* the younger, *Richard Dykes Alexander*, of Ipswich, bankers, for the payment of the 1000*l.* mentioned in this bond, in addition to a bond bearing date the 2d of November 1816, for 4000*l.* *William Tills.*"

In 1822 a commission issued against *Tills*, who was at that time indebted to the banking firm, on the general balance of account, in the sum of 3000*l.* for money lent and advanced and interest.

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This was a petition that the premises comprised in the title-deeds deposited might be sold, and the proceeds applied in reduction of the general balance.

It appeared from the affidavit of *Tills*, that the balance due to the banking firm at the time of *Spooner's* death was 2993*l.*, since which he had, at different times, paid in 3360*l.*, and drawn out, at different times, 3660*l.*

Mr. *Montagu* and Mr. *Hinde* for the petition.

Mr. *Bell* and Mr. *Rose*, for the assignees, contended, that the lien was confined to the last sum of 1000*l.* only; that the account was to be split into two distinct parts; and a balance struck at the time of *Spooner's* death; that the first bond and agreement were to be considered as a security for that balance only; and that the payments made by the bankrupt subsequent to *Spooner's* death, being first applicable to the payment of that balance, according to the cases of *Devaynes v. Noble*, 1 *Merivale*, 530., *Bodenham v. Purchas*, 2 *B. & A.* 39., had in fact discharged it, and had thus extinguished the first bond and agreement.

Mr. *Montagu*, in reply, contended, that *Spooner* was only a nominal partner, and that the firm, as between those parties, consisted virtually of the present petitioners, in whom alone, both in law and equity, had the right ever existed: *Teed v. Elworthy*, 14 *East*, 220., *Parsons v. Crosbie*, 5 *Esp.* 199., cited in *Teed v. Elworthy*,

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Harrison v. Fitzhenry, 3 Esp. 288.; that the bankrupt, by the words of the memorandum accompanying the deposit, had given the lien a retrospective as well as a prospective operation.

The fact of *Spooner* not having been interested, was disputed.

The VICE-CHANCELLOR.

The *Alexanders* appear to be, in this case, substantially the creditors. *Spooner* and the *Alexanders* are *bona fide* partners, as against creditors, but not as against debtors, according to the doctrine in the cases cited. My present impression is, that the argument on the part of the petitioners is right; but the case cannot be disposed of without a reference, to ascertain whether *Spooner* had, on the 2d of November 1816, any interest as a partner in the profit and loss in the banking concern.

A reference was accordingly made to Mr. *Cooke*, who, by his report, stated, that *Spooner*, on the 2d of November 1816, had not any interest as a partner in the profit or loss in the banking concern of *Alexander*, *Spooner*, and *Alexander*.

The petition came on upon Mr. *Cooke's* report.

Mr. *Montagu* for the petition.

Mr. *Bell* and Mr. *Rose*, against it, contended, that though *Spooner* was in reality nothing more than a nominal partner, still, upon the law of the case, a lien could be

supported to the extent of 1000*l.* only; that the cases cited by Mr. *Montagu* applied only to simple contract debts, in which it was admitted a suit might be sustained without joining the nominal partner: but this being the case of a bond, did not come within that rule: that the case of *Bodenham v. Purchas*, 2 *Barn. & Ald.* was in point; in which case it was decided, that a bond given under similar circumstances not having been treated as a distinct account, but blended in the general account with other transactions, the surviving obligees were not entitled so to treat it at a subsequent period; and that having received, in different payments, a sum more than sufficient to discharge the debt due on the bond at the time of the death of the deceased partner, the bond was to be considered as paid.

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In the view which I take of this case it is not necessary to discuss the general questions which have been argued at the bar. The first memorandum is in effect an agreement that the estate in question shall be a security for all advances made or to be made by the five partners, not exceeding 2000*l.* The second memorandum is in effect an agreement with the petitioners only, that the estate in question shall be a security for all advances made or to be made by them, not exceeding 1000*l.*, in addition to the 2000*l.* mentioned in the former bond: that is, shall be a security to the petitioners for the sum of 3000*l.* The petitioners have, therefore, an equitable lien for 3000*l.*

The usual order was made for the sale of the premises, and the application of the proceeds, after payment

with *Hay* and others, under the firm of *Geddes, Hay, and Co.*, as a merchant. In 1810 that partnership failed, and the partners made a composition with their creditors. In that same year *Geddes* left Liverpool and went to Stromness, Orkney, where he resided exclusively up to the period of his bankruptcy. In 1811, *George Geddes*, upon the death of his father, who had carried on business as a banker at Stromness, took upon him his father's business, which he continued till the year 1819. Upon the 18th of January, 1820, a commission of bankruptcy issued against the petitioner, *George Geddes*, upon an act of bankruptcy committed by him upon the fourth of the same month: and on the 26th of January, 1820, a petition was preferred to the Court of Session in Scotland, by the Respondents, *Cæsar Mowat* and *William Spence*, for a sequestration of the estate of the petitioner *Geddes*. The commission of bankruptcy having been discovered to be invalid, on the 15th of March 1820, the petitioner, *John Gerard Geller*, a creditor in respect of a debt due to him from *George Geddes* as an underwriter, sued out a new commission against the petitioner, *Geddes*, upon the same act of bankruptcy, and the usual assignment of his estate and effects was made to the other petitioners, *John Gerard Geller* and *James Watson*: in consequence of such commission and assignment the petitioners, *John Gerard Geller* and *James Watson*, opposed the application for sequestration in Scotland; and when the petition for sequestration was moved in court, which was not till the 25th of May 1820, the application was opposed by counsel on behalf of the said petitioners, *Geller* and *Watson*, on the grounds that the proceedings under the commission in England ought to take the lead of, and supersede the necessity for the sequestration, and at any rate, that the proceedings under the commission had gone so far as to

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oar any further proceedings under the sequestration. They also objected to the debt upon which the sequestration was demanded; first, that the bill produced as ground of the debt was null and void, as being written on a wrong stamp; and, secondly, that the claim was contingent, and incapable under the sequestration act (a) to support a petition for sequestration. A sequestration was nevertheless pronounced for by interlocutor of the Lord Ordinary officiating on the bills on the 16th of August 1820. On the 4th of October 1820, a petition was presented at the instance of the petitioners, founded on the twenty-second section of the said sequestration act, in which the petitioners prayed the Court to recal the sequestration, and to find the petitioners entitled to their expences: and by interlocutor of the Lords of the first division of the Court of Session of the 5th December 1820, the interlocutor of August 16th was adhered to, and afterwards and upon the 17th of January 1821, a petition was again given in, which the Lords were pleased to refuse without answer. From the interlocutor of the Lord Ordinary of the 16th of August 1820, and from the interlocutors of the Lords of the first division of December 5th, 1820, and January 17th, 1821, the petitioners now appealed and prayed that such interlocutors might be reversed or varied.

Mr. Hart and Mr. Shadwell for the Appellants.

Mr. Montagu and Mr. Maidment for the Respondents.

The evidence and points of argument, being recapitulated by Lord *Gifford* in the judgment expressed by his Lordship upon this case, are here omitted.

(a) 54 G. 3. c. 137. s. 54.

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It appears from the evidence in the present case that *George Geddes*, a native of Scotland, some years previous to the year 1811, went to Liverpool, and was engaged there in business as an underwriter and merchant in partnership with other persons, under the firm of *Geddes, Hay, and Co.* It appears that, as an underwriter, he carried on business in particular instances on his own account: in the year 1810 or the beginning of 1811, the partnership of *Geddes, Hay, and Co.* failed, and *George Geddes* then returned to Stromness, in Scotland, where his father carried on the business of a banker. In 1811, Mr. *Geddes* senior, died, and Mr. *George Geddes* the petitioner succeeded to, and continued till the year 1819, to carry on the business of a banker at Stromness; in the course of which a debt was contracted by him, with *Cæsar Mowat* and *Wm. Spence*, the Respondents in the present case, under the circumstances hereafter noticed. It is clear, that from the year 1810 or 1811, when *George Geddes* returned to Scotland, to the year 1819, he was domiciled in that country. It appears that, in December 1819, he quitted Scotland for England, having fallen into difficulties; and that, on the 4th of January 1820, as is alleged by the Appellants, he committed an act of bankruptcy, upon which, on the 18th of January, a commission issued against him upon the petition of a creditor of the name of *Smith*, residing in London. There was some imperfection in that commission, as it is said, in the petitioning creditor's debt, and it was superseded: on the 15th of March 1820, a second commission issued against *Geddes* on the petition of *John Gerard Geller* of Liverpool, which commission was executed at Liverpool, and *Geller* and *Watson* were appointed assignees. In the month of August,

1824. 1820, *Geddes* obtained his certificate under that commission.

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In the mean time, and anterior to the issuing of this second commission of March 15th, 1820, viz.: on the 26th of January 1820, a petition at the instance of the present Respondents, *Mowat* and *Spence*, was preferred in Scotland, and a deliverance upon that petition pronounced on the 27th of January 1820. Proceedings went on upon that petition, and a sequestration was finally pronounced on the 16th of August 1820. That sequestration was opposed by the present Appellants, the assignees under the commission. It was contended, that the sequestration ought not to be proceeded in, on account of the English commission which had issued in the month of March, founded on an act of bankruptcy committed, as was alleged, on the 4th of January preceding. The result was, that the sequestration was sustained, and on the 5th of December the Lords finally adhered to the interlocutor which had previously been pronounced in favour of the sequestration.

The objections to the sequestration were several. First, it was alleged, that the debt of the Respondents, upon which that sequestration had proceeded, was founded on a promissory note, dated 9th September 1819, which note was drawn upon a wrong stamp; secondly, that the debt was a contingent debt, and therefore not sufficient to support a sequestration. It was objected, also, that even were this a valid debt, still the sequestration was overreached by the commission which issued in March, founded on the act of bankruptcy committed upon the 4th of January preceding. With respect to the first objection, the circumstances under which the debt was contracted are these: *Forbes* and Co., bankers in

Edinburgh, had in their hands the sum of 276*l.* 16*s.* 8*d.*, belonging to a person of the name of *John Mowat*, who, since the year 1811, had not been heard of; and it was alleged by the Respondents that he was dead, and that they had evidence of that fact, and that they were his representatives. *Geddes*, who, as was before stated, was a banker at Stromness, and then getting into difficulties, and anxious to obtain funds to meet the demands upon him, applied to the Respondents, who, as representatives of *John Mowat*, would be entitled to that sum, for permission to receive the same from *Forbes* and Co. It appears *Geddes* was authorised by the Respondents to receive that sum, it being agreed, that he should be permitted to retain it for two months. Accordingly, *Geddes* received this money from *Forbes* and Co., who not being satisfied respecting the alleged death of *John Mowat*, and no representation having been formally taken out, required an indemnity, which was given by *Geddes*, and which is set out upon the proceedings, against any claim which might be made against them on behalf of *John Mowat*. For this sum, together with 47*l.*, for which he was previously indebted to the Respondents, *Geddes* gave a promissory note in these words: "30th September, 1819, two months after date I promise to pay *Cæsar Mowat* and *William Spence* 323*l.* 16*s.* 8*d.*, as the balance due to the heirs of the deceased, *John Mowat*, at Sir *Wm. Forbes, J. Hunter* and Co. Edinburgh.—*George Geddes*." When the above note was given no stamp of the exact amount could be procured at Stromness; the Appellant, *Geddes*, wrote across the note the following words: "No 6*s.* stamp to be got here.—*George Geddes*." Upon this the first objection to the debt was grounded; that it was upon a wrong stamp, and therefore could not be supported. The answer which was given, and I think satis-

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factorily given, was, that the promissory note in this case was not the foundation of the debt; the debt existed before the promissory note was given; the moment he received the money from *Forbes* and Co., by desire of the Respondents, it became money had and received in his hands for their use, and a debt due from him to them: therefore, if the debt could be established by other evidence than the promissory note, the circumstance of his having given an invalid promissory note to secure a good previously existing debt, does not destroy such debt, nor is the promissory note necessary to be had recourse to, in order to establish the previous existence of the debt: and a case was cited from the English law, *Brown v. Watts*, 1 *Taunton*, 353., which, as far as relates to England, clearly establishes this doctrine, which is founded on principles of good sense and justice. On this ground it has been held, at law, as I think, satisfactorily, that this was a debt due, independently of the promissory note; that the promissory note was not necessary to be resorted to, in order to establish the debt; and that the previously existing obligation in *Geddes* to account for the money received from *Forbes* and Co. was sufficient.

Then, as to the objection that it was a contingent debt. It is urged, that the Respondents have not proved satisfactorily that *John Mowat* is actually dead, and that till such fact be proved, it is no debt. It is not competent for *Geddes* now to make such objection; he having received the money from *Forbes* and Co., and having agreed to account to the Respondents for the same, he cannot now say that *John Mowat* may still exist, and may hereafter call upon him for the money. He is bound by his receipt of the money for the Respondents, having received it upon the supposition of *John Mow-*

at's death, and upon their authority, without which he could not have received it: I apprehend, therefore, that there is no objection whatever to the debt, and, consequently, none to the sequestration upon that ground.

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The next is a question deserving of great consideration, as to the real state of the facts, in order that the decision in the present case may not clash with certain cases which were pressed upon the House from the bar. The case of *Stein v. the Bank of Scotland* (a), and the case of *Selkrig v. Davis* (b) have established a principle that cannot be shaken, and great care must be taken, that nothing in the present decision shall tend to impeach the doctrine contained in those cases. *Geddes*, at the time of the sequestration, and at the time of the English commission, was clearly domiciled in Scotland. The first commission in England, on which considerable stress was laid in the court below, as if it were connected with the second, was superseded. The second had no connection whatever with it. The first was issued on the 18th of January, which was prior to the application for the sequestration in Scotland; but that commission by the supersedeas became a mere nullity. In the mean time, on the 26th of January, there was a regular petition on behalf of the Scotch creditors for a sequestration, he being a Scotchman, and domiciled in Scotland.

By the twenty-second section of the Sequestration act it is enacted, "that the party applying for the sequestration, whether the creditor or creditors alone, or the

(a) 2 *Rosc*, 197.

(b) 2 *Rosc*, 97. 291.

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bankrupt with the concurrence of a creditor or creditors, shall cause the petition of sequestration and the first deliverance thereon to be recorded in the general register of inhibitions, within fifteen days after the said deliverance is pronounced, and the same shall, from the date of the deliverance, be held equivalent to an inhibition, and to a citation in an adjudication against the debtor and his property, for behoof of the whole creditors, in case the sequestration be finally awarded; but the proceeding shall be of no effect as an inhibition, or as a citation in an adjudication, if such registration be omitted." So that when a sequestration is finally awarded, it takes effect from the date of the original application. This, therefore, was a regular application for a sequestration in Scotland, on the 26th of January; the deliverance was pronounced on the following day, and sequestration finally awarded as on that day. Afterwards, in the month of March, an English commission was granted, subsequent, therefore, to the application for the sequestration. But then it was argued, that the English commission, by relation to the act of bankruptcy, which it is alleged was committed on the 4th of January, is to have the effect of superseding and annulling the whole proceeding on the sequestration. The question then would be, supposing it depended merely upon that, which is to have the priority? and, after having anxiously considered the whole case, in order to avoid the possibility of interfering with the cases which have been pressed from the bar, I have no doubt that the sequestration is a valid sequestration, and that it could not be overreached by the commission of bankruptcy: and it is remarkable, that though there was evidence given in Scotland respecting the issuing of the commission by means of the Gazette, yet there was no evidence adduced respecting the act of bankruptcy. This, there-

fore, appeared to be an application for a commission in the month of March, which was long posterior to the application for the sequestration.

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There is another point to be observed upon; the bankrupt, as has already been stated, was a domiciled Scotchman: it is alleged, but I do not find it in evidence, that he went to Liverpool in order to have his accounts settled, in the month of November. It is strongly to be suspected, that finding himself in difficulties in Scotland, and foreseeing a sequestration, he removed to England, in order to commit an act of bankruptcy, and that upon that the English commission was founded; upon this, however, there is no evidence, but it is singular, that in the commission he is described as "formerly of Liverpool, but now of Stromness, Orkney," so that those who issued the commission were aware that they were issuing it against a person actually resident in Scotland; and I think it might admit of a serious question, independently of the point of priority, whether this commission of bankruptcy in England, under these circumstances, might not be considered as having been issued in fraud of the law of Scotland: issued as it was against a party, native of Scotland, then resident in Scotland, domiciled in Scotland for years, going to England, in December, and on the 4th of January committing an act of bankruptcy, on which an English creditor, upon a debt incurred so long back as during the bankrupt's carrying on business in Liverpool, as an underwriter; for the debt, it appears, was on a policy of insurance. These circumstances, supposing the first English commission to have been a valid commission, might have given rise to such a question, had the subject of the present decision been, whether such commission should supersede the diligence of the Scotch cre-

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Ex parte

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In the matter
of
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ditors; but it is unnecessary to consider that point in the present case, in which the simple question is, which has the priority.

My Lords, under all the circumstances of the case, I have no doubt that the Scotch sequestration has the priority. It was applied for before the English commission, and as a sequestration was subsequently awarded, it was to be considered in effect as a sequestration from the first application, and that being anterior to the subsisting English commission, the decision of the court of Scotland, affirming the validity of the sequestration, appears to me a right decision.

Interlocutor affirmed, with costs.

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3 Geo. IV. Cap. 74.

*An Act to amend the Laws relating to Bankrupts under
Joint Commissions.* [22d July 1822.]

WHEREAS by the laws now in force relating to bankrupts, where a joint commission has issued against two or more persons, being partners, under which commission one or more and not all of the bankrupts may be entitled to have such commission superseded, but may be unable to obtain such supersedeas without the consent of some or one of the bankrupts not entitled to or not consenting to such supersedeas, which may be attended with great inconvenience: may it please your majesty that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that where a joint commission of bankruptcy has issued, or shall hereafter issue, against two or more persons, it shall be lawful for the lord high chancellor, lord keeper, or lords commissioners of the great seal, to supersede such joint commission as to one or more of the bankrupts, without prejudice to the validity of the commission as to such one or more of the bankrupts as to whom such commission is not ordered to be superseded; or as to his, her, or their certificate or certificates; but such commission and certificate, as to him, her, or them, shall continue in full force and operation.

Where a joint commission of bankruptcy has issued, it may be superseded as to one or more of the bankrupts, without prejudice to the commission.

3 Geo. IV. Cap. 81.

An Act to amend the Laws relating to Bankrupts.

[26th July 1822.]

Empowering
commissioners to
summon wit-
nesses as to
trading and act
of bankruptcy.

Books and papers
to be produced.

Persons refusing
to attend may be
apprehended.

WHEREAS it is expedient to provide by law as herein-after is enacted : may it please your majesty that it may be enacted ; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall and may be lawful to and for the commissioners in any commission of bankrupt, or the major part of them, by writing under their hands and seals, to summon before them, at any meeting or meetings to be held under the commission, after they have duly qualified, and before the bankruptcy is found, all and every such person and persons as they shall be informed and believe can give any account or information concerning the trading, or any act or acts of bankruptcy committed by the person or persons against whom such commission shall be issued ; and also to require such person or persons so summoned to produce any books of account, papers, deeds, and writings, and other documents in the custody, possession, or power of such person or persons, which may appear to such commissioners, or the major part of them, to be necessary to establish such trading or act or acts of bankruptcy ; and in case the said person or persons so summoned to appear as aforesaid, shall refuse to come or shall not come before the said commissioners at the time appointed, having no lawful impediment, such as shall be admitted and allowed by the said commissioners, or the major part of them, and made known to the said commissioners at the time of their meeting, it shall be lawful for the said commissioners, or for the major

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part of them, by warrant under their hands and seals, and directed to such person or persons as to them, or the greater part of them, shall be thought meet, to apprehend and arrest such person or persons, and to bring him, her, or them before the said commissioners, or the major part of them, to be examined as aforesaid; and upon his, her, or their refusing to come, to commit the party so refusing to such prison as the said commissioners, or the major part of them, shall think meet, there to remain without bail or mainprize until such time as such person or persons so refusing to come shall submit him, her, or themselves to the said commissioners; and upon the appearance of the said person or persons, it shall be lawful for the said commissioners, or the major part of them, to examine him or them concerning the trade of or any act or acts of bankruptcy committed by the person or persons against whom such commission shall be issued, in the same manner as they are now authorized to examine any person present at any meeting of the commissioners; and in case any person or persons present at any such meeting of the commissioners shall refuse to be sworn, or being one of the people called *Quakers*, to take the solemn affirmation by law appointed for such people to take, or shall refuse to answer all or any such lawful questions as by the said commissioners, or the major part of them, shall be put unto him, her, or them, touching the trading of, or any act or acts of bankruptcy committed by the person or persons against whom such commission shall issue, as well by word of mouth as by interrogatories in writing, or shall refuse to sign and subscribe his, her, or their examination taken down or reduced into writing (not having a reasonable objection either to the wording thereof, or otherwise, to be allowed by the said commissioners), or shall refuse to produce or shall not produce all and every book of account, paper, writing, and other document in the custody, possession, or power of such person or persons, which may appear to the commissioners, or the major part of them, to be necessary to establish the trading of, or act or acts of bankruptcy committed by the person or persons against whom such commission shall issue, and which such person or persons

Persons refusing to be examined, or to produce books, &c. may be committed.

was or were required to produce, and to the production of which such person or persons shall not state any objection which, in the judgment of the commissioners or the major part of them, ought to be allowed as lawful objections, it shall and may be lawful to and for the said commissioners, or the major part of them, by warrant under their hands and seals, to commit him, her, or them to such prison as the said commissioners, or the major part of them, shall think fit, there to remain without bail or mainprize until such time as such person or persons shall submit him, her, or themselves to the said commissioners to be sworn, and full answer make to the satisfaction of the said commissioners to all such lawful questions as shall be put to him, her, or them, and sign and subscribe such examination, and produce all such book and books of account, papers, deeds, writings, and other documents in his, her, or their custody, possession, or power, as may appear to the said commissioners, or the major part of them, to be necessary to establish the trading or act or acts of bankruptcy committed by the person or persons against whom such commission of bankrupt shall be issued as aforesaid, and to the production of which no such objection as aforesaid has been allowed, according to the true intent and meaning of this act.

Payment of costs to witnesses at opening of commission.

II. Provided also, and be it further enacted by the authority aforesaid, that where any witness or witnesses is or are summoned to attend before the commissioners in any commission of bankruptcy, at the meeting appointed by them for opening such commission, the necessary expences shall be tendered to such witness or witnesses, in the same manner as is now by law required upon service of a subpoena to a witness in any action at law.

Enabling assignees to execute powers previously vested in bankrupts.

III. And be it further enacted by the authority aforesaid, that all powers vested in or belonging to any bankrupt or bankrupts, which he, she, or they might legally execute for his, her, or their own benefit, (except the right of nomination to any benefice with cure of souls, or parochial church or

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chapelry then actually vacant), shall and may be executed and exercised by the assignee or assignees for the benefit of the creditors, in such and the same manner, to all intents and purposes, as the bankrupt himself could or might have executed or exercised the same.

IV. And be it further enacted by the authority aforesaid, that it shall and may be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, upon a petition presented to him or them by the assignee or assignees, or by a purchaser under the commission from the assignee or assignees, of any part of the bankrupt's estate or effects, to order the bankrupt, at the time of the allowance of or after he has obtained his certificate, to join in the conveyance and assurance of any estate and effects of such bankrupt, according to the tenor of any order that shall be made therein upon such petition; and if any such bankrupt shall refuse or neglect to execute any such deed or conveyance within such time and in such manner as shall be directed by such order so to be made as aforesaid, then such bankrupt so refusing, declining, or neglecting to execute such deed or conveyance, and his heirs, executors, administrators, and assigns, and all and every person claiming under him by virtue of any act by him done from the time he became bankrupt, shall be for ever estopped from objecting to the validity of such deed or conveyance; and such deed or conveyance shall, upon an order made upon petition by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, be declared to be and as effectual to all intents and purposes whatsoever, both at law and in equity, as if it had been executed by the said bankrupt.

Lord Chancellor may order bankrupts to join in conveyances.

V. Whereas by an act passed in the fifth year of the reign of His Majesty King George the second, intituled "An act to prevent the committing of frauds by bankrupts," reciting, that it might be found necessary that as well assignments of bankrupts estates then already made by commissioners, as assignments thereafter to be made pursuant to the choice of creditors, should be vacated, and a new assignment or assignments made

Lord Chancellor may vacate deeds of bargains and sales.

5 G. 2. c. 30.

of the debts and effects unreceived and not disposed of by the then assignees to other persons to be chosen by the creditors ; it was therefore enacted and declared, that it should and might be lawful to and for the Lord Chancellor, Lord Keeper, or Commissioners for the custody of the Great Seal for the time being, upon petition of any creditors, to make such order therein as he or they should think just and reasonable ; and in case a new assignment should be ordered as aforesaid, then that such debts, effects, and estate of such bankrupt should be thereby effectually and legally vested in such new assignee or assignees : And whereas doubts have arisen whether the said clause extends to authorize the vacating of deeds of bargain and sale enrolled of the lands, tenements, and hereditaments of bankrupts, and it is deemed expedient that such doubt should be removed : Be it therefore enacted and declared by the authority aforesaid, that such clause does extend to the vacating of any deeds of bargain and sale enrolled of the lands, tenements, and hereditaments of any bankrupt, and that from time to time hereafter it shall and may be lawful to and for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the Great Seal for the time being, upon the petition of any creditors, to make such order as he or they shall think just and reasonable, for the vacating of any deed of bargain and sale of the lands, tenements, and hereditaments, freehold or copyhold, of any bankrupt or bankrupts then remaining unsold, and not conveyed ; and the inrolment thereof, without nevertheless in any manner affecting the title of any purchaser under any bargain and sale prior to such order being made, and without reviving any estate previously barred, but the title of every such prior purchaser, and of all claiming under him, shall be good and valid to all intents and purposes whatever, in the same manner as if no such order had been made ; and that the Lord Chancellor, Lord Keeper, or Lords Commissioners for the time being, may order the commissioners, or the major part of them, to execute a new bargain and sale of such lands, tenements, and hereditaments as shall remain unsold or not conveyed to such person or persons, and in such manner as to him or them may seem just ; and that

A new bargain
and sale may be
executed.

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such conveyance shall be good and valid to all intents and purposes whatsoever, without any conveyance from any former assignee or assignees, or his or their heirs or assigns : Provided always, that the order so made for vacating such bargain and sale shall be duly enrolled, together with the new bargain and sale made in pursuance of such order.

VI. And whereas doubts have been suggested, whether any person who wilfully and corruptly swears falsely in an affidavit made before a Master in Chancery in any matter of bankruptcy, is liable to the pains and penalties now by law inflicted for this offence of wilful and corrupt perjury, and which doubts ought to be removed ; be it therefore further declared and enacted by the authority aforesaid, that every such offender is liable to such pains and penalties ; and that if any person at any time hereafter shall wilfully and corruptly swear falsely in any affidavit or deposition, (or, being one of the people called Quakers, shall wilfully and corruptly affirm falsely), before any Master in Chancery in ordinary or extraordinary in any matter of bankruptcy, such person, being convicted thereof by indictment or information, shall be liable to suffer the pains and penalties now in force against wilful and corrupt perjury.

Punishment of perjury before masters.

VII. And be it further enacted by the authority aforesaid, that on the trial of any suit or action now commenced or brought, or to be commenced or brought, or of any issue directed or which shall hereafter be directed to be tried, an office copy of any bond, affidavit, certificate, report, exception, letter of attorney, or of any other original instrument or writing filed in the office, or officially in the custody or possession of the Lord Chancellor's secretary of bankrupts for the time being, shall be evidence to be received of such bond, affidavit, certificate, report, exception, letter of attorney, or other original instrument or writing respectively, without producing the original, such copy being upon proper stamp, and proved by oath on such trial to be a true copy ; and in case any such bond, affidavit, certificate, report, exception, letter of attorney, or other writing, shall hereafter be produced on any

Making office copies evidence in certain cases.

such trial, the costs of producing the same shall not be allowed on taxation of costs in any such suit or action, unless it shall be made appear, to the satisfaction of the officer who shall tax such costs, that from the nature of the case to be proved the production of such bond, affidavit, certificate, report, exception, letter of attorney, or other writing on any such trial was necessary, and not occasioned through any neglect, default, or delay in obtaining such office copy thereof as aforesaid : Provided always, that nothing herein contained shall extend to authorise the receiving in evidence of such office copy, or to alter or affect any evidence now required on the trial of any indictment or prosecution for felony or perjury, or other offence or misdemeanor.

Joint commissions may be issued against two or more of the partners in a firm.

VIII. And be it further enacted by the authority aforesaid, that any creditor or creditors whose debt or debts is or are of a nature and amount sufficient to entitle him, her, or them to petition for a commission of bankruptcy to be issued against all the partners of any firm, may petition for a commission of bankruptcy to be issued against two or more partners of such firm ; and that a commission may be issued upon such petition, which shall be valid at law, to all intents and purposes whatsoever, notwithstanding it does not include all the partners of which the firm is composed.

To stay the prosecution of a second or other commission.

IX. And be it further enacted by the authority aforesaid, that if, after a commission of bankruptcy shall be issued against two or more members composing part of a firm, another commission or other commissions of bankruptcy shall be issued against any one or more members of such firm not included in the commission which first issued, such second, third, or other commission shall be directed to the commissioners to whom the first commission was directed ; and immediately after the declaration of bankruptcy under such second, third, or other commission, the commissioners or the major part of them shall convey to the assignee or assignees chosen under the first commission all the estate, real and personal, of such bankrupt or bankrupts, in the same manner as if such commission had

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first issued ; and from and after such conveyance all separate proceedings under such second, third, or other commission shall be stayed, and it shall, without affecting the validity of the first commission, be annexed to and form part of such first commission : Provided always, that the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, may, if it to him or them appear necessary, direct that such second, third, or other commission to be issued to any other commissioners, or that such commission shall proceed, either separately or in conjunction with such first commission, in the same manner as if such second, third, or other commission had alone issued.

X. And be it further enacted by the authority aforesaid, that in case a joint creditor or joint creditors of three or more persons being partners shall be the petitioning creditor or creditors in a commission of bankruptcy issued against two or more persons being partners, as well such joint creditor as any other joint creditor shall be permitted to vote in the choice of assignees, and to assent to or dissent from the signature of the said bankrupt's certificate in respect of his, her, or their joint debt or debts ; but neither the petitioning nor any other joint creditor shall be permitted to receive any other dividend out of the separate estate of the said bankrupt or bankrupts until all the separate creditors of the said bankrupt or bankrupts shall have received twenty shillings in the pound on their respective debts.

Joint creditors of three or more partners may vote in the choice of assignees in certain cases.

XI. And be it further enacted by the authority aforesaid, that after an assignee or assignees has or have been chosen under any commission which may be issued against one or more member or members of a firm, it shall and may be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, by order upon petition presented to him or them, to permit and authorize the assignee or assignees of the estate and effects of any such bankrupt or bankrupts to commence or prosecute any action or actions ;

Assignees may use the names of partners in suits.

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Indemnifying
such partners
whose names
shall be used
in suits,

suit or suits, or other proceedings at law or equity, in the name or names of such assignee or assignees and of the remaining partner or partners, against any debtor or debtors of the said partnership, and shall and may recover and obtain such judgment, decree, or order therein, in the same manner as if such action, suit, or proceeding was instituted with the consent of such partner or partners whose names shall be so used in such action or proceeding; and that if such partner or partners whose names shall by such order be so used shall attempt, by any means whatsoever, to release the debt or demand for which such action, suit, or proceeding is instituted, such release shall be null and void to all intents and purposes whatsoever: Provided always, that the partner or partners whose name or names is or are used in pursuance of such order, and by whom no benefit is claimed by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect thereof; and provided also, that in all cases it shall be lawful for such partner or partners whose name or names is or are so used, to apply by petition to the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, praying that he, she, or they may receive the whole or such part of the proceeds of such action, suit, or proceeding to which he, she, or they may be entitled, who shall thereupon make such order as under all the circumstances of the case shall seem meet and just, and which shall be binding on all the parties.

One partner entitled may receive allowance before others not entitled.

XII. And be it further enacted by the authority aforesaid, that in all commissions of bankruptcy which shall hereafter issue against all or any of the members of any partnership, under which any one or more of the persons against whom the commission shall issue shall obtain his, her, or their certificate, and a sufficient dividend be paid upon the joint estate of the firm, and the separate estate of him, her, or them who has or have obtained such certificate, he, she, or they shall be entitled to his, her, or their allowance, notwithstanding no allowance may be due to any one or more of his, her, or their copartners.

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XIII. And be it further enacted, that this act shall not extend to those parts of the United Kingdom called Ireland and Scotland. Act not to extend to Ireland and Scotland.

XIV. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded. Public act.



DIGESTED INDEX

TO THE

CASES IN THIS VOLUME,

AND TO THE

CONTEMPORARY CASES DECIDED IN THE OTHER COURTS.

ACCOUNTANT.

See ASSIGNEES, 3.

ACTION.

See ASSIGNEES, 17. 23.

COSTS, 4, 5. 7. 9.

1. Where, by a marriage settlement, the trustees covenanted to permit the husband to receive during his life, the dividends arising from bank stock vested in their names, — if the husband become bankrupt, and the trustees authorize a third person to receive the dividends and pay them over to the bankrupt's wife, they are liable to his assignee in an action for money had and received. *Allen v. Impett*, 2 Moore, 240. S. C. 8 Taun. 263.

2. A. effected an insurance on the life of B., and after an act of bankruptcy, assigned the policy to C., who was aware of A.'s circumstances at the time. On the death of B., it was discovered that his life was not insurable. On a memorial presented

by A. to the company, they ordered half the sum for which B.'s life was insured to be paid as a gratuity, which C. received, and the policy was then cancelled, and remained in the hands of their officer. In an action of trover brought by the assignee of A. against C., to recover the value of the policy: Held, that he was only entitled to the parchment on which the policy was written, and not the sum paid by the company to C., as it was a mere gratuitous and voluntary payment. *Wills v. Wells*, 2 Moore, 247.

3. In November 1818, a commission of bankruptcy was issued against M. and Co., under which the defendants were appointed assignees. H. being indebted to M. and Co., had deposited with the defendants as assignees of M. and Co., a promissory note, and in January 1819 paid this debt to the defendants as such assignees, who then delivered the note back to him. H. had, unknown to any of the parties, in May 1818, committed an act of bankruptcy, and in May 1819, a commission issued against him. In Au-

gust 1819 the commission against M. and Co. was superseded, and in September 1819 a new commission was issued against them, under which the defendants were again chosen assignees. Between the superseding of the first commission against M. and Co., and the re-appointment of the defendants as assignees under the second, the plaintiffs, as assignees of H., demanded of the defendants the sum which H. had paid to them as assignees of M. and Co. In an action by the plaintiffs as assignees of H., against the defendants in their own right, for the money received by them from H., the jury having found a verdict for the defendants, the Court refused to grant a new trial. *Davenport v. Carter*, 2 Brod. & Bing. 317.

4. A. agreed to consign goods to B. and C. abroad, to be there sold on commission on his own account, on which the defendant guaranteed that B. and C. should sell them to the best advantage, and render a just account of sales. Before any consignments were made, C. had ceased to be partner with B., and the defendant became one in his stead, under the firm of B. and Co. A. afterwards consigned goods to B. and Co., who remitted the proceeds thereof to the defendant, for the purpose of being handed over to A., who in consequence drew bills on the defendant, which he by letter agreed to accept, depending on A.'s promise to provide for them if remittances should not arrive from B. and Co. to meet them; A. became bankrupt, previous to which B. and Co. had remitted to the defendant, directing him to pay A. on account of the goods consigned by him, which were not received by the defendant till after the bankruptcy. B. and Co. afterwards sent other remittances with similar directions, with which

the defendant credited the bankrupt in his account, and debited him for the acceptances given by him before the bankruptcy, but which were paid afterwards. In an action by the assignee to recover those subsequent payments: Held, that he was not entitled to recover, as there was a specific appropriation of the proceeds to provide for the defendant's acceptances before the bankruptcy. *Thomas v. Da Costa*, Moore, 386.

5. If a defendant give in evidence a commission of bankruptcy at the trial, and a receipt given by the assignees to prove payment of a sum of money from him to them, and the judge is inclined to think such proof sufficient; if the defendant afterwards attempt to prove the validity of the commission, and fails, and the jury find a verdict for the plaintiff: Held, that the defendant is precluded from disturbing it. *Smith v. Evans*, 2 Moore, 474.

6. On the dissolution of partnership between B. and C., C. filed his bill in equity against B. for an account. A. admitted that he owed a balance to the houses of B. and C., and was made a defendant in the suit in equity: C. applied to the Court of Chancery for a writ of *ne exeat regno* against A. for a much larger sum than that admitted, alleging that to be the balance due to the house of B. and C. The Court granted the writ for the smaller sum only, and A. was accordingly held to bail for the smaller sum, which he paid into Court. B. became bankrupt. The assignees of B., C. being one of them, arrested A. for the larger sum. This Court refused to discharge A. out of custody on the ground that this case did not come within the principle *nemo debet bis vexari pro eadem causa*. *Musgrave v. Medes*, 8 Taunt. 24.

7. A. sued out a *ca. sa.* against B.,

who having put in bail, became bankrupt and obtained his certificate: A. in about two months afterwards signed an agreement to accept a composition from B., provided all his creditors would accept the same, a few days after the signature of the agreement by A., execution was levied by him on B.'s bail: Held, that the *ca. sa.* against the principal and all the proceedings against the bail must be set aside; but that as the bail had so long delayed their application they could only be relieved on payment of costs. *Thackery v. Turner*, 8 Taun. 28.

8. A. sold goods to B., to be paid for by a bill at two months, and not being able to obtain it from B. and doubting his solvency, A. employed his broker to repurchase them in his own name, which was done, although at a great loss. B. afterwards became bankrupt without knowing that the goods had been repurchased by the broker on account of A. In an action of trover brought by the assignees of B. against A. for the goods: Held, that they were not entitled to recover, as the transaction was not fraudulent on the part of A. *Harris v. Lunell*, 4 Moore, 10.

9. The bankrupt assigned a policy of insurance to the defendant: the company however considering it invalid, paid the defendant half of the sum insured as a gratuity on his giving up the policy. In an action of trover by the assignee of the bankrupt to recover the value of the policy: Held, that the value of the parchment only, and not the sum gratuitously paid was recoverable. *Wills v. Wells*, 8 Taun. 264.

10. The owner of a ship consigned her to persons abroad, who hypothecated her, and directed the captain to sign a bottomry bond. On her arrival in London, he by

their direction delivered the register to the defendant (the agent of the consignees,) who gave it to their solicitor to institute proceedings in the Court of Admiralty on the bottomry bond. The ship was sold by order of that Court, and the register decreed to be given up to the purchaser. The owner became bankrupt, and his assignees brought an action of trover for the register: Held, that they could not recover, as they might have appeared in the Admiralty Court and prevented the sale of the vessel, and as the delivery of the register to the purchaser under the decree of that Court was not a conversion. *Hossack v. Masson*, 4 Moore, 361.

11. Where the defendant having agreed to lend to two persons, who afterwards became bankrupts, 200*l.* to be applied to a specific purpose, drew a check on his banker for that sum, and delivered it to them before their bankruptcy, and they not having used the cheque, returned it to the lender after having committed an act of bankruptcy: Held, that their assignee could not maintain trover for the cheque. *Moore v. Barthrop*, 1 Barn. & Cres. 5.

12. A. agreed to consign goods to B. and C., foreign merchants, to be sold abroad on commission on his account, on which D. guaranteed that B. and C. should sell the goods to the best advantage. Before any transaction took place, C. ceased to be a partner with B., and D. residing in London, took C.'s place under the firm of B. and Co. A. afterwards consigned goods to B. and Co. abroad, who remitted the proceeds to D. for the purpose of being handed over to A., who in consequence drew bills upon D., which he by letter agreed to accept, stating that he depended upon A.'s promise to pro-

vide for them if remittances should not arrive from B. and Co. to meet them, and desiring that A. would write to him that the bills were drawn on account of A.'s consignments to B. and Co. A. became bankrupt, previous to which B. and Co. had remitted to D., directing him to pay A. on account of goods consigned by A., which remittances were not received by D. till after the bankruptcy. B. and Co. afterwards sent other remittances with similar directions, with which D. credited the bankrupt in his account, and debited him with the acceptances given by D. to A. before his bankruptcy, but paid afterwards. In assumpsit by the assignee of A. to recover the last remittances from D., who had applied them to the liquidation of his acceptances in favour of A.: Held, that he was not entitled to recover on the ground of a specific appropriation of the proceeds of the goods consigned to B. and Co. before the bankruptcy, to provide for the acceptances so given to A. by D. *Thomas v. Da Costa*, 8 Taun. 345.

13. The Court refused to stay proceedings in an action by assignees until the costs of an action for the same cause brought by assignees under a former invalid commission had been paid. *Dawson v. Sampson*, 2 Ch. 146.

14. A. & Co. and B. & Co. respectively carried on the business of bankers at Maidstone; B. & Co. became bankrupts, and at the time of their act of bankruptcy the two banks held notes and other securities of each other to nearly the same amount; the provisional assignee of B. & Co. knowing that fact, presented and obtained payment of the notes of A. & Co. partly at their bank and partly at the house of their agents in London, who were ignorant of the situa-

tion in which they stood. Held that A. & Co. might recover the amount so received in an action for money had and received against the provisional assignee. *Edmeads v. Newman*, 1 Barn. and Cres. 418.

15. Where a bankrupt was required by his assignees on his last examination to deliver to them his books of account, which he did: Held that he must be deemed to have delivered them on compulsion, and it being afterwards found that he was not a trader, and that the commission had improperly issued that he might support an action of trover against such assignees without any previous demand of the books. *Summersett v. Jarvis and another*, 6 Moore, 56.

16. If a sheriff legally take goods in execution, the proprietor whereof afterwards becomes a bankrupt, and the sheriff sells at one time, after the bankruptcy, enough to satisfy both that execution, and also another execution, which being delivered to him after the bankruptcy is void, the bankrupts' assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution. *Stead and others, assignees of Moorhouse v. Gascoigne*, 8 Taun. 527.

17. In an action of trover by the assignees of a bankrupt, an account stated between the bankrupt and the defendants, from which it appears that certain proceeds constituting part of the account, had come into the hands of the defendants subsequently to the bankruptcy, is sufficient to throw upon the defendants the onus of proving their right to retain such proceeds, although a large debt upon the balance is due to the defendants. *Carter v. Barclay*, 3 Starkie, 43.

18. An agreement between the bankrupt and the defendants before

the bankruptcy that the defendants shall accept bills, to enable the bankrupt by his agent abroad to purchase cargoes and transmit them to the defendants, who were to pay their acceptances out of the proceeds, and to place the surplus to the account of the bankrupt, is no defence to an action for proceeds received after the bankruptcy. *Carter v. Barclay*, 3 Starkie, 43.

19. Where a defendant in an action brought against him by the assignee of a bankrupt, pleaded the general issue, without giving notice of his intention to dispute the bankruptcy, he may, under a judge's order, have leave to withdraw such plea, and plead it *de novo*, with the notice required by the 49 G. 3. c. 121. s. 10. *Gardner v. Slack*, 6 Moore, 489.

ACT OF BANKRUPTCY.

See EVIDENCE, 11. 14. NOTICE. RELATION, 1, 2. SUPERSEDEAS, 4.

1. A trader by lying in prison for two months on an arrest for debt commits an act of bankruptcy, although he may be confined originally, and during the same period under a magistrate's warrant, on the certificate of commissioners of bankrupt on a criminal charge of refusing to submit to answer questions; because, as he may at any time be liberated by submission, the lying in prison is voluntary, and therefore within 21 Jac. 1. c. 19. s. 2., — and more especially if his attorney have obtained a judge's order for his release as to that warrant, upon the commissioners' certificate that they do not mean to examine him further, although the order be not made a rule of court, nor acted upon, and the trader knows nothing

of it. *The King v. Page*, 7 Price, 616.

2. A fraudulent conveyance made voluntarily by a trader in order to give a preference to particular persons to the prejudice of his general creditors, is an act of bankruptcy, although the bankrupt subsequently continued to carry on his trade for three years, at the end of which time a commission issued. *Pulling v. Tucker*, 4 Barn. & A. 382.

3. If a trader gives a general order to be denied to all comers, this is sufficient evidence of a beginning to keep house with intention to delay creditors. *Lloyd v. Heathcote*, 2 Brod. & Bing. 388.

4. A beginning to keep house with such intention constitutes an act of bankruptcy, though no creditor is actually delayed. *Lloyd v. Heathcote*. 2 Brod. & Bing. 388.

5. A partnership between A. and B. was dissolved by consent; A. being separately possessed of freehold and leasehold estates, after the dissolution conveyed them to trustees for sale or mortgage, and empowered them to execute such conveyances as they should think fit, for the purpose of converting his said estates into money, in order to enable him to carry on his trade and pay his creditors, and it was agreed that such conveyances might be made by the trustees without the concurrence of A., and that they should be seized and interested in the money arising from such sale or mortgage. When this deed was executed, A. had stock in trade and other personal effects to a considerable amount, independently of the partnership assets, which were not sufficient to pay the partnership debts. The trustees were not creditors of either A. or his partner. A. and his partner afterwards gave C. & Co., who were not creditors of either, a power of

attorney to make demands of every description, to examine and settle all the accounts, together with other powers to act for them, they agreeing to ratify whatever should be done under it. A deed was afterwards prepared by A. and his trustees for the purpose of conveying all A.'s freehold and leasehold estates, previously conveyed to D. and Co., to sell or mortgage, with a view to raise 130,000*l.* and 40,000*l.* in negotiable bills of exchange, and to indemnify the drawers and acceptors from the payment thereof; but these sums were not advanced, nor were the bills drawn, nor any other act done under the latter deed: Held, that neither the execution of the first conveyance to his trustees, nor of the power of attorney under these circumstances, constituted an act of bankruptcy by A. *Berney v. Davison*, 4 Moore, 126.

6. A. and B. being in partnership as traders, and in insolvent circumstances, stopped payment on the 15th February, 1819, and dissolved their partnership on that day. A. being separately possessed of freehold and leasehold estates, conveyed the whole of them on the same day by indentures of lease and release to trustees in trust for sale or mortgage, for the purpose of converting such estates into money, it being convenient to A. to raise money at an early period. Subsequently to this conveyance A. and B. gave a power of attorney to C. and Co. to recover all debts which should be due to them, together with full powers for them to act: Held, that these circumstances did not constitute an act of bankruptcy by A. *Berney v. Vyner*, 4 Moore, 322.

7. Shutting up a banker's shop not an act of bankruptcy by a partner residing in another place. *Ex parte Mavor*, 19 Ves. 543.

8. Under an agreement to pay bills indorsed into a county bank, on discount for the notes of the bank, bills, paid in after the bankruptcy of some partners, but before that of the whole firm, cannot be retained by the assignees. *Ex parte M'Gae*, 19 Ves. 607.

9. A trader having been arrested on the 20th of May, desired his servants not to let into the house any persons whom they did not know, as he was afraid of being arrested again. On the morning of the 21st, the doors of the house were kept shut, and no person was admitted until it had been ascertained from the window who he was: Held, that an act of bankruptcy was committed on that morning, although no creditor was denied. *Harvey v. Ramsbottom*, 1 Barn. & Cres. 55.

10. Where a trader ordered his servant to say that if any creditors called he was not at home, and he was accordingly denied, but was in bed ill at the time: Held, that it was properly left to the jury, whether this was a beginning to keep house with an intent to commit an act of bankruptcy and that they were warranted in finding that it did. *Lazarus v. Waithman*, 5 Moore, 313.

11. A denial by a trader to the collector of church and highway rates, who called for assessments due from him, after he had given a general order to be denied to all comers, is an act of bankruptcy; and such order is sufficient evidence of a beginning to keep house with an intent to delay creditors: and a beginning to keep house with such intent constitutes an act of bankruptcy, although no creditor is actually delayed thereby. *Lloyd v. Heathcote*, 5 Moore, 129.

12. Two partners in trade left their shop, stating their purpose to

be to get some bills discounted, or to get some means to satisfy demands; and told their shopman, if any creditor called to make some excuse. On the next day the shopman, without further authority, denied them, although at home, to a creditor who had called on the preceding day, when they had also been denied. No evidence of any attempt to get bills discounted was offered: Held, that the jury had rightly considered their intention in leaving the shop to be to delay the creditors. *Deffe v. Desanges*, 8 Taunt. 671.

13. In order to make out an act of bankruptcy by lying in prison for two months, the whole of the day of arrest may be taken into account; but a portion of the day may be considered for the purpose of shewing a valid act to have been done before the bankruptcy. *Saunderson v. Gregg*, 3 Starkie, 72.

14. A trader being arrested on the 23d of August, obtains his liberty upon undertaking to attend to execute a bail bond, but breaks his word; and on the 8th of September admits to the bailiff that he was at home when the bailiff called, and that the trader had been denied to him. The omission to execute the bail bond does not amount to an act of bankruptcy, and the declaration of the trader on the 8th is not admissible. *Schooling v. Lee*, 3 Starkie, 149.

15. A person carrying on business at Warwick, came occasionally to London to make purchases for his trade, and while in London was frequently at the counting-house of C., with whom he dealt, and where other persons were in the habit of calling on him: Held, that desiring C. to deny him to a creditor, whom he expected to call, and concealing himself in C.'s house when the creditor

did call, was an act of bankruptcy. *Curteis v. Willis*, 1 Ryan & M. 58.

16. A penalty due to the crown, is a debt within 21 Jac. 1. c. 19. s. 2., therefore, where a trader lay in prison above two months, being unable to pay Exchequer penalties for smuggling: Held, that it was an act of bankruptcy. *Cobb v. Symonds*, 5 Barn. & Ald. 516.

17. Goods of the bankrupt having been delivered to a purchaser on the day on which the bankrupt went to prison, and paid for the next day, the payment will be defeated by the relation of the act of bankruptcy, by lying in prison for two months to the day of the arrest. *Saunderson* and others, assignees of *Probert v. Gregg*, 3 Starkie, 72.

ADJOURNED EXAMINATION.

See PROTECTION.

ADJUDICATION.

See PETITIONING CREDITOR.

ADVANCING PETITION.

See PRACTICE, 10.

ADVERTISEMENT, SUSPENSION OF.

Advertisement of the bankruptcy in the Gazette suspended, under the circumstances, on the petition of a creditor, until the next Gazette day; when, upon the consent of all the creditors, the commission was su-

perseded. Ex parte *Ogilby*, 1 G. & J. 250.

AFFIDAVITS.

See CERTIFICATE, 3. 13, 14. COMMISSIONERS, 1. JURISDICTION, 3. PRACTICE, 11. 25. SUPERSEDEAS, 8.

1. Filing affidavits in answer is a waiver of the objection to the affidavits in support of the petition, that they were filed before the petition was presented. Ex parte *Gilpin* re *Smith*, 1 G. & J. 183.

2. Affidavit of personal service of petition to stay the certificate, sworn but not filed on the day of hearing, treated, under the circumstances, as no affidavit, and the petition dismissed with costs. Ex parte *Long* re *Sylvester*, 1 G. & J. 351.

3. Affidavit of personal service of petition must be filed before it can be read. Ex parte *North*, 4 Mad. 395.

AMENDMENT.

1. Where there was error in the description of the petitioning creditor in the petition and commission, but the docket papers were correct, the petition and commission were ordered to be amended and made conformable to the docket papers after the commission had been prosecuted. Ex parte *Guthrie* re *Savery*, 1 G. & J. 245.

2. Application for the amendment of the commission, and petition refused. Ex parte *Forshaw* re *Horricks*, 1 G. & J. 368.

APPROPRIATION

ANNUITY.

See CERTIFICATE, 30. CONDITION. SURETY, 1.

1. The value of an annuity to be proved in bankruptcy is not the stipulated price for redemption, nor the original price simply, but in the absence of any peculiar circumstances, the original price with the variation occasioned by the lapse of time since the grant. Ex parte *Whitehead*, 19 Ves. 557.

2. Order of payment, where the bankrupts real estate is pledged for securing an annuity. Ex parte *Slack* re *Jarman*, 1 G. & J. 346.

APPORTIONING.

See PROOF.

APPROPRIATION.

See ACTION, 4. 12.

1. A. had for the purpose of sale consigned a cargo of fish to B., who was in correspondence and connected with the house of C. C. had advanced money to A. on an engagement from A. that the proceeds of the cargo or fish should be remitted by B. to A., through the hands of C., in order that they might so constitute a security for the money advanced by C. A. then wrote to B., telling him that the cargo of fish was not responsible for any advances made by C. Notwithstanding this, B. after the receipt of A.'s letter remitted the proceeds to C., who retained them to cover his advance, A. having become bankrupt, and his assignees having sued B. for these

proceeds: Held, that a jury was warranted in considering A's engagement as an appropriation of the cargo of fish which he could not rescind, and not a mere order for payment of money which might be revoked by a subsequent countermand before payment. *Fisher* and another, assignees of *Chesmer v. Miller*, 1 Bing. 150.

2. A bond was given by country bankers to the several persons constituting the firm of a London banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the London bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London bankers. It was the course of business between the two houses for the London bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the London bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the London bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one, the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: Held, that

the entries in the books of the London bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the London bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm. *Simson* and others v. *Benjamin Ingham*, the heir of one *Joshua Ingham* deceased, and the said *Benjamin Ingham* and others, devisees of the said *Joshua Ingham* deceased, 2 Barn. & Cres. 65.

ARBITRATION.

See COMMISSION, 5.

ARREST.

See ACTION, 6. BAIL, 1, 2. CERTIFICATE, 24. COSTS, 4, 5. PROTECTION.

ASSIGNEES.

See ASSIGNMENT, 1, 2, 3. COSTS, 7. EVIDENCE, 2, 8. JURISDICTION, 2. LEASE. PRACTICE, 12, 20.

1. Though a case appear in which the Court would, upon an immediate application, vacate the choice of assignees on account of an improper rejection of proofs, yet it will not interfere where there is delay in making the application. Ex parte *Scholey* re *Greenway*, G. & J. 2.

2. Assigness not permitted to bid

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in their private character. *Ex parte Hodgson re Cook*, G. & J. 12.

3. Assignees, being accountants, not permitted to charge the estate for business done as accountants. *Ex parte Read re Sowerby*, G. & J. 77.

4. Real property of the bankrupt put up to sale by auction in two lots, and bought in by the assignee without the authority of the creditors. Upon a re-sale there is loss on one lot and gain upon the other. Though the balance is in favour of the bankrupt's estate, the assignee charged with the loss on the lot under-sold. *Ex parte Lewis re Leonard*, G. & J. 69.

5. Assignees may apply to supersede, even for defects appearing on the proceedings; but such applications will be watched with jealousy; and it is their duty to do all in their power to clear away doubts as to the validity of the commission, before they apply. *Ex parte Graves re Westron*, G. & J. 86.

6. It is the first duty of assignees to satisfy themselves that the commission is well founded. *Ex parte Graves re Westron*, G. & J. 86.

7. Persons appointed by the Court to prove and receive dividends, cannot vote in the choice of assignees. *Ex parte Shaw re Howard and Gibbs*, 1 G. & J. 151.

8. When, upon a joint choice of three persons as assignees, the Court rejects the nomination of one of them, it will set aside the choice altogether, as it cannot collect from the nomination of three persons jointly an intention to entrust the administration to two of the three, if one be rejected. *Ex parte Shaw re Howard and Gibbs*, 1 G. & J. 155.

9. Though the creditors at a meeting convened by advertisement, sanction a sale of the bankrupt's effects at

a valuation to one assignee, the Court will not order that the assignee should be allowed to become the purchaser, without a reference to ascertain whether the effects can be more advantageously disposed of. *Ex parte Serle re Rossiter*, 1 G. & J. 187.

10. Where the assignee was chosen before one commissioner only, and the assignment was executed to him by their commissioners, a new choice was directed. *Ex parte Moore re Garton*, 1 G. & J. 190.

11. Application by creditors to restrain the assignees from a sale of the bankrupt's stock in trade, and lease refused. *Ex parte Montgomery re Russell*, 1 G. & J. 338.

12. Where the bankrupt's reversionary estate was offered for sale by auction, and 950*l.* bid, and the same was bought in for 1000*l.* upon a reserved bidding to that amount, and afterwards, when reduced into possession, sold for 510*l.*: Held, under the circumstances, not within the rule established in *Ex parte Lewis*, so as to make the assignee liable for the difference. *Ex parte Buxton re Thompson*, 1 G. & J. 355.

13. The 20*l.* per cent. given by the fourth section of 49 Geo. 3. c. 121. applies to solvent assignees only. *Ex parte Goldsmith re Willett and Kent*, 1 G. & J. 405.

14. Assignees putting up to sale the bankrupt's interest to an estate, "as he lately held the same, an abstract of which may be seen at the office of Messrs. I. and Co.:" Held, that the vendee could not insist upon any other title than such as the bankrupt had. *Freem v. Wright*, 4 Mad. 394.

15. Assignee desirous of becoming a purchaser of the estate of the bankrupt, must first obtain the consent of the creditors, and then pe-

tition, and serve the other assignees and also the bankrupt with the petition. Ex parte *Page* re *Wickstead*, 4 Mad. 459.

16. Assignees ordered to indorse a bill which the bankrupt before his bankruptcy had transferred to the petitioner for a valuable consideration, but without indorsement; the indorsement to be special, so as to secure the assignees from personal liability. Ex parte *Mowbray* re *Everett*, 1 Jac. & W. 428.

17. Assignees not restrained from bringing a second action (having been nonsuited in the first) for the recovery of certain sums, from a creditor who had given credit for them in his account, and had proved for the balance. The general rule, however, is, that they must proceed by petition, if the creditor has proved. Ex parte *Hilton* re *Oliver*, 1 Jac. & W. 467.

18. Assignee removed for the convenience of the estate, as in case of infirmity, does not pay the costs, as he does when removed for his own convenience. *Anon.* 5 Mad. 76.

19. Assignees improperly resisting plaintiff's demand, and brought before the Court by supplementary bill, may be made liable to the costs of the whole suit, but they were refused where no application had been made before filing such bill. *Whitcomb* v. *Minchin*, 5 Mad. 91.

20. A plaintiff suing as assignee of an insolvent debtor or bankrupt, is not by analogy to the case of executors and administrators, within the exemption from the 23 Hen. 8. c. 15., but if nonsuited must pay the defendant's costs. *Andrews*, assignee of *Pain*, an insolvent debtor, v. *Sealy*, 8 Price, 212.

21. If the defendant has a good case against one of the plaintiffs, who hold a joint office, though not against the others, the Court cannot make a

decree in that suit for the plaintiffs. *Hunter* v. *Richardson*, 6 Mad. 89.

22. When, on a petition to the Vice Chancellor, an order was obtained under the statute 5 Geo. 2. c. 30. s. 31. directing that a new assignment should be executed to the plaintiff, in which the two former assignees, and one of such assignees absconded, and the assignment was executed by the plaintiff and the other alone: Held, that the plaintiff could not maintain an action of assumpsit for goods sold and delivered, as an application should previously have been made to the Vice Chancellor, stating the reason of the non-joinder of the third assignee. *Aldritt* v. *Kittridge*, 6 Moore, 569.

ASSIGNMENT.

See EVIDENCE, 5. 13. FRAUDULENT CONVEYANCE. PROOF.

1. Commissioners ordered forthwith to execute the assignment to the petitioners who had been elected assignees by the major part in value of the creditors who had proved and voted, when the meeting had been adjourned by the commissioners for the purpose of investigating a claim not sufficient to turn the choice. Ex parte *Woolley* re *Dowman*, 1 G. & J. 366.

2. Upon a bequest to pay an annuity for life to A., with a proviso that if by any ways or means whatsoever, he should sell, dispose of, or incur the right benefit or advantage he might have for life or any part thereof, his interest should cease and the trustees should apply and determine the same for the benefit of his child: Held, that upon his bankruptcy it ceased to be the subject of his personal enjoyment, and

did not therefore vest in his assignees, but that his children were entitled. *Cooper v. Wyatt*, 5 Mad. 482.

3. Where a trader committed an act of bankruptcy on the 9th of November, and the sheriff took his goods in execution on the 15th, and sold them on the 21st of December, and a commission was issued on the 23d, and an assignment made on the 6th of January following: Held, that the assignees might maintain trover against the sheriff, although he had sold them before the assignment was made, as the bankrupt's property vested in them by such assignment from the act of bankruptcy by relation. *Lazarus v. Waithman*, 5 Moore, 313.

ATTACHMENT.

See Costs, 4, 5. 7.

ATTENDANCE OF WITNESSES.

See Witness.

ATTESTATION.

See Certificate, 5. 8. *PRACTICE*, 1. 22. 24.

ATTORNEY.

See Election, 6. *SOLICITOR*.

1. An attorney of the Court of King's Bench may sue out a commission of bankruptcy, and maintain an action for the fees due upon that business, without being admitted a

BAIL.

solicitor in chancery. *Wilkinson v. Diggell*, 1 Barn. & Cres. 158.

2. The attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises belonging to the bankrupt to join in the sale of the mortgaged premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupt, to ascertain the amount of principal and interest due upon the mortgage, &c. The latter did so. The sale did not afterwards take effect. In an action brought by the bankrupt's attorney against the mortgagee's attorney for the amount due for the business done, it was held that the question was properly submitted to the jury, whether the credit was given to the defendant; and the jury having found that it was, that the attorney was liable; although at the time when the business was done, it was known to be done for the benefit of the mortgagee. *Scrace, gent. v. Whittington*, gent. 2 Barn. & Cres. 11.

B.

BAIL.

See Action, 7.

1. If a debtor who has become bankrupt, and obtained his certificate, make a promise afterwards to a creditor to pay him at a future day the debt which was due to him before the bankruptcy, he not only revives the debt, and thereby renders himself liable to be sued for its recovery, but he may be held to bail in an

action against him, founded on the demand so revived by the subsequent promise; because, as it becomes a good debt recoverable at law, it must have all the incidents of a legal debt, and all the ordinary modes of proceeding to recover it are open to the creditor. So held, notwithstanding the decisions of the Court of King's Bench in *Bailey v. Sillon*, (2 Burr. 736.), and *Wilson* and others v. *Kemp*, (3 M. & S. 595.) and therefore they refused to order a bail bond entered into by a defendant under such circumstances to be cancelled. *Blackbourn* administrator, v. *Ogle*, 8 Price, 526.

2. A bankrupt who has obtained his certificate, if he afterwards promise to pay a creditor a debt due from him before his bankruptcy, revives the creditor's right to sue him, and he may be arrested on such promise. *Drew v. Jeffries*, 8 Price, 531.

BANKRUPT.

See ACTION, 15. BAIL, 1, 2. COMMISSION, 1, 2, 3. 11. COMMITMENT. COSTS, 1, 4, 5, 7. PROTECTION. SUPERSEDEAS, 1, 7, 10. SURRENDER, 1, 2. WITNESS, 6, 7, 8.

1. Bankrupt who had abandoned a petition presented by him in June 1821 for a supersedeas, and had joined in a conveyance of part of his property, and solicited and procured the requisite signatures to his certificate, restrained from proceeding in an action brought by him against the messenger to impeach the commission. *Ex parte Cutten re Ruspini*, 1 G. & J. 317.

2. A bankrupt is entitled to an inspection of the proceedings for the purpose of ascertaining the debts

proved, with a view to his certificate. *Ex parte Morgan re Morgan*, 1 G. & J. 404.

3. In an action of trespass for false imprisonment, brought by an uncertificated bankrupt in C. P., after nonsuit in K. B. for the same cause, on the ground that he was not there prepared with evidence to prove the validity of a former commission. The Court will stay the proceedings until the plaintiff pay the costs of the former action, as he then ought to have been prepared with evidence to substantiate the first commission. *Crawley v. Impey*, 2 Moore, 460.

4. A bankrupt having surrendered in due time, refusing to answer certain questions of the commissioners regarding the disposal of money, assumed by them to have belonged to him, giving as his reason that he means to contest the validity of the commission, is not guilty of felony within the 5 Geo. 2. c. 30. s. 1. *The King v. Page*, 7 Price, 616.

5. The plaintiff, against whom a commission of bankruptcy had been wrongfully issued, being required by assignees under the commission to deliver up his books, did so: Held, that he might recover of the assignees in trover without formally demanding a restoration of the books. *Summersett v. Jarvis* and others, 3 Brod. & Bing. 2.

6. A commission of bankruptcy had issued against A. in 1808, under which he did not obtain his certificate. Another commission issued against him in 1815, under which he was imprisoned, and brought his action in King's Bench against the commissioners for that imprisonment. At the trial, being unprepared with proof of the first commission, he was nonsuited. He then brought an action for the same cause

in Common Pleas, which Court staid the proceedings in the latter action till the costs of the former should be paid. *Crawley v. Impey*, 8 Taun. 407.

7. Assumpsit by the indorsee against the maker of a promissory note payable to A. B. or his order. Plea, first, non-assumpsit; and, secondly, that A. B. became a bankrupt, and that his property was duly assigned to assignees, whereby the indorsement by A. B. was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the indorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant, who had made the note payable to A. B. or his order, was estopped from saying that A. B. was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. *Drayton and another v. Dale*, 2 Barn. & Cres. 293.

8. Trespass *quare clausum fregit* may be maintained against a stranger by a tenant of the land for a trespass committed before his bankruptcy.

BANKRUPTCY.

See BARON AND FEME. JURISDICTION.

Debt on stat. 2 Geo. 2. c. 23. for acting as a solicitor in the Court of

BARON AND FEME.

Chancery (viz. in the matter of T. S. a bankrupt,) the defendant not being a solicitor of the said Court: the plaintiff having proved that the defendant, (not a solicitor of the Court) had been consulted, and had been instrumental in a matter of petition to the Lord Chancellor by the creditors of T. S., which petition bore the name of certain admitted solicitors, and was intituled, "In bankruptcy," praying for the taxation of the bill of the solicitor to the commission, was nonsuited, and the Court refused to set the nonsuit aside. Semble, that proceedings in bankruptcy are not proceedings in Chancery. *Ford v. Webb*, 3 Brod. & Bing. 241.

BANKRUPT'S PETITION.

See COMMITMENT, 10.

Petition by bankrupt, to supersede for want of an act of bankruptcy, presented two years after the issuing of the commission, dismissed. *Ex parte Abell re Abell*, 1 G. & J. 199.

BARON AND FEME.

A divorce obtained by a wife after her husband's bankruptcy, does not entitle her in equity to the whole of a fund bequeathed to her, which came into possession after the bankruptcy, although no settlement was made upon her at her marriage, and her husband at that time received 1500*l.* stock in her right. Upon a reference to the master to approve of a proper settlement upon the wife out of a fund accruing in her right, which was claimed by the assignees of her husband, the Court directed

the master to have regard to the extent of the fortune received by her husband in her right, as well as to any other settlement which he might have made. *Green v. Otte*, 1 Sim. & Stuart, 250.

BILL IN EQUITY.

See JURISDICTION, 5. SUIT, 2.

BILLS OF EXCHANGE.

See ASSIGNEES, 16. CERTIFICATE, 18. COMMISSION, 8. ELECTION, 4. MUTUAL DEBTS AND CREDITS, 3, 4. PETITIONING CREDITOR'S DEBT, 1. 3. 7, 8. PROOF, 4.

1. The bankrupt having delivered a promissory note as a security for a debt less than the amount of the note, without indorsement; ordered, that the creditor should be at liberty to bring an action on the note in the name of the assignees, indemnifying them, and undertaking to account for surplus recovered. Petitioners to pay costs of petition, as upon an agreement without writing. *Ex parte Brown re Salisbury*, 1 G. & J. 407.

2. A promissory note is drawn for the accommodation of A., who transfers it to B. and C. without indorsement, for valuable consideration, and afterwards becomes bankrupt and dies intestate: Held, that B. and C. might recover against the drawer, the note having been indorsed several years after it was due by B. to B. and C., B. having for that purpose procured letters of administration to the effects of A. *Watkins v. Maule*, 2 Jac. & Walk. 237.

3. A customer was in the habit of indorsing and paying into his ban-

kers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands; the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson and others v. Giles and others, Assignees of Alexander Andrade and Thomas Wordwick, bankrupts*, 2 Barn. & Cress. 422.

BILL OF SALE.

See JURISDICTION, 6.

BOOKS.

See ACTION, 16. PRODUCTION OF BOOKS.

C.

CERTIFICATE.

See AFFIDAVIT, 2. BAIL, 1, 2.
BANKRUPT, 2. COSTS, 8. 10.
PRACTICE, 15, 16. SUPERSEDEAS,
10. SURETY, 4, 5, 6.

1. The solicitor employed by the bankrupt to procure his certificate, neglecting to obtain the signatures of the commissioners to the certificate which had been long before signed by the proper number of creditors, ordered to deliver up the certificate and affidavits to the bankrupt, and to pay the costs of the application. *Ex parte Houghton re Houghton*, 1 G. & J. 14.

2. A petition to stay a certificate must be personally served two clear days before the petition day. *Ex parte Hopley re Illingworth*, 1 G. & J. 63.

3. Certificate not stayed upon matter contained in affidavits in reply, where the petition and affidavits filed with it did not make a case for staying it. *Ex parte Amdale re Smith*, 1 G. & J. 37.

4. A mortgagee may petition to stay a certificate. *Ex parte Whitchurch re Rood*, 1 G. & J. 71.

5. Petition to stay the bankrupt's certificate attested by the solicitor's agent, which is not in conformity with the general order, dismissed with costs. *Ex parte Hirst re Houseman*, 1 G. & J. 76.

6. Person appointed by the Court to prove and receive dividends, quære, whether he can sign the certificate. *Ex parte Shaw re Howard and Gibbs*, 1 G. & J. 151.

7. A creditor having the bankrupt in custody, and presenting a petition to prove and stay the certificate, or

to stay the certificate until the petitioner has had reasonable time to ascertain the amount of his debt, and to prove it, must discharge the bankrupt. This petition, praying that the certificate might be stayed until the petitioner had had reasonable time for ascertaining the amount of his debt and proving it, dismissed with costs. *Ex parte Blaydes re Calvert*, 1 G. & J. 179.

8. Signature and sealing of the bankrupt's certificate by one of the commissioners, not attested by the solicitor to the commissioner, or his clerk, or the messenger, or the clerk of such commissioner, in conformity to the general order of August 1809, the certificate sent back to the commissioners to re-certify. *Ex parte Jones re Tate*, 1 G. & J. 186.

9. Certificate stayed, upon the petition of the partner of the bankrupt, until the partnership accounts should be taken, no want of due diligence being imputable to the petitioner. *Ex parte Hadley re Thatcher*, 1 G. & J. 193.

10. Petition to prove and stay certificate presented eight months after the issuing of the commission, and the delay not accounted for, dismissed with costs. *Ex parte Smith re Thatcher*, 1 G. & J. 195.

11. Certificate will not be recalled but upon a clear case against the bankrupt. *Ex parte Hood re Foulerton*, 1 G. & J. 219.

12. Application to stay the certificate on the ground of concealment of property, when the circumstances of concealment had been disclosed, and the whole property delivered up to the assignees before the signature of the certificate by the commissioners, refused, but without costs. *Ex parte Bryant re Collett*, 1 G. & J. 205.

13. Joint certificate of the two

bankrupts ordered to be advertised for allowance as to the survivor, where one of the bankrupts died without having made the affidavit of conformity. *Ex parte Cossart re Cossart*, 1 G. & J. 248.

14. Application to stay the certificate on the ground that the day of the month and the year of the signature of the creditors was not inserted at the time, and that the affidavits of the parties witnessing their signatures did not state the time of such signatures, refused. *Ex parte Laing re Golding*, 1 G. & J. 348.

15. Where the certificate had been suspended by a petition presented to stay it, another petition to stay presented during its suspension, but after expiration of three weeks from the notice in the Gazette: Held, not presented in time, and dismissed with costs. *Ex parte Wright re Sylvester*, 1 G. & J. 352.

16. A party who has proved a debt, and afterwards assigned it, cannot sign the certificate without the authority of the assignee. *Ex parte Taylor re Herbert*, 1 G. & J. 399.

17. Petition to stay a certificate, alleged that the bankrupt had acknowledged to have lost a particular sum by stock jobbing transactions which was supported by affidavit. The bankrupt denied the loss, but did not deny having made the acknowledgment: Petition dismissed without costs, as the acknowledgment was a justification of the petition. *Ex parte Enderby re Pasmore*, 5 Mad. 76.

18. A bill of Exchange drawn by defendant in Ireland, and accepted and paid by plaintiff in England, is a debt contracted in England and cannot therefore be discharged by a certificate under an Irish commission of bankruptcy. *Lewis v. Owen*, 4 Barn. & Ald. 654.

19. A defendant against whom, in an action for damages on a tort, a verdict has been taken, subject to the award of an arbitrator: Held, to be discharged from the debt by his certificate obtained before the entering up of judgment, where he had become bankrupt between the verdict and the making of the award, and that execution could not be sued out on the judgment, because the plaintiff might have proved the damages recovered under the commission by producing the record. Nor can he support such execution for the costs. A *fieri facias* issued on a judgment entered up under such circumstances and executed, set aside on the terms of the defendant undertaking to bring no action against the sheriff. *Beetson v. White*, 7 Price, 209.

20. Where a bond was given under 4 Geo. 3. c. 33. s. 1. by a member of parliament being a trader, and after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson v. Campbell*, 5 Barn. & Ald. 250.

21. An overseer of the poor is discharged by his bankruptcy and certificate from a debt due in respect of a sum of money in his hands as overseer at the time of his bankruptcy, although this happen before the expiration of his year of office, before which time he cannot be compelled to account. *The King v. Tacker*, 5 Mau. & Selw. 508.

22. Where in an action of debt, an assignment of a bail bond was taken, the defendant not having perfected bail, and an action being brought on the bond, he became bankrupt between plea and verdict, and obtained his certificate after

final judgment: Held, that he was discharged from the damages and costs of the latter action, as the debt on the bail bond was proveable under the commission. *Dimsdale v. Eames*, 4 Moore, 350.

23. Petition to stay the certificate on the ground of the rejection of a debt having been served on the bankrupt only one day before the petition day, dismissed with costs. *Ex parte Hopley re Illingworth*, 2 Jac. & Walk. 220.

24. A bankrupt who has obtained his certificate cannot be arrested upon a subsequent promise to pay a debt due before his bankruptcy, *Peers v. Gadderer*, 6 Barn. & Ald. 116. But See BAIL.

25. The Court will not order an *exoneretur* to be entered on the bail piece, on the ground of the defendant's having obtained his certificate in Ireland; but will direct an issue in order to ascertain the circumstances under which the original debt was contracted. *Bamfield v. Anderson*, Bart. 5 Moore, 331.

26. Where an attorney was made bankrupt and described in the Gazette as a "dealer and chapman," and obtained his certificate, and the plaintiff afterwards arrested him as acceptor of a bill of exchange payable before the commission issued, the Court discharged him on common bail, although the plaintiff swore that he did not know that the defendant was the person mentioned in the Gazette, and that he intended to dispute the validity of the commission on the ground of fraud. He should have stated the nature of such fraud, and when he discovered its existence. *Kemp v. Neville*, 5 Moore, 21.

27. In an action by original, if the defendant does not appear, the bail bond is forfeited on the quarto die

post, the other four days being allowed merely *ex gratia*, and therefore where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days it was held that the penalty of the bond was a debt proveable under the commission, and therefore barred by the certificate. *Coulson* assignee of the sheriff of Middlesex *v. Hammon*. 2 Barn. & Cres. 626.

28. A bankrupt having promised after his bankruptcy, and before certificate, to pay a debt due before the bankruptcy, indorsed to the plaintiff two promissory notes for that purpose: Held, that his certificate was no bar to an action on these notes. *Briz v. Braham*, 1 Bing. 281.

29. Bankruptcy and certificate are no discharge to a bond given under 4 Geo. 3. c. 53. by a trading member of parliament, where the judgment in the suit in which the bond was given is obtained after the bankruptcy, though before certificate. *Campbell v. Jameson*, 1 Bing. 320.

30. A surety under an annuity deed, who has redeemed the annuity subsequently to the bankruptcy and certificate of the grantor, may maintain an action against the grantor for the sum paid on account of redemption, although the grantee may have proved the value of the annuity under 49 Geo. 3. c. 121. s. 17. *Watkins v. Flanagan*, 1 Bing. 413.

COMMISSION.

See AMENDMENT, 1, 2. ASSIGNEES, 5, 6. EVIDENCE, 4. PETITIONING CREDITOR, 1, 2, 3, 5, 6. PRAC-

TICE, 14. SEQUESTRATION, 2. SUPERSEDEAS.

1. Bankrupts should be described in the commission according to their legal or known description. *Ex parte Beckwith re Hall*, 1 G. & J. 20.

2. Where the bankrupts were described as of "Sun Wharf, London, and Wolverhampton," they having no residence or establishment at Wolverhampton, commission superseded. *Ibid*.

3. Commission against L. H. M. of Finsbury Square, in the city of London, instead of the county of Middlesex, not a material mis-description. *Ex parte Smith re Martelly*, 1 G. & J. 256.

4. The drawing of lots as directed in the order in bankruptcy of the 29th of December 1806, only applies to those cases where both parties are at the time prepared to issue a commission forthwith. Where one party therefore was not prepared to certify respecting the intended commissioners, as required by the order of the 25th of July 1817, the other was held entitled to the commission. *Ex parte Hardman*, 1 Jac. & Walk. 293.

5. Where a case was referred by order of nisi prius, and after the reference, but before the making of the award, the plaintiff became bankrupt: Held, that this was no revocation of the submission, and that the arbitrator having awarded a verdict for the defendant, had done right. *Andrews v. Palmer*. 4 Barn. & Ald. 250.

6. V. and Co. creditors of U. and Co., being displeased with the conduct of Wilbran, one of the partners in the firm of U. and Co., arrested U. and Co. All the partners put in bail except Wilbran who continued

in prison two months, and a commission was issued against him by U and Co. Wilbran petitioned to supersede the commission on the ground that it was taken out for the purpose of dissolving the partnership as to him: Held, that a commission is a legal right, and is not affected by the object of the party suing it out, unless there be fraud. Petition dismissed. *Ex parte Wilbran*, 5 Mad. 1.

7. A prior commission of bankrupt which has never been acted upon or superseded, does not invalidate a subsequent commission. Where such prior commission was produced for the purpose of proving notice of an act of bankruptcy: Held that it was unnecessary to shew that nothing had been done under it. It is for the party raising the objection to shew the prior commission to be in legal operation. *Warner v. Barber*, 8 Taun. 176.

8. The acceptor of a bill of exchange which is drawn and accepted after the issuing of a commission of bankrupt, but before the commission is opened or appears in the Gazette, is not protected by statute 1 Jac. 1. although he has not any knowledge of the bankruptcy, or of the issuing of the commission, and pays the bill to a bona fide holder; for the statutes 46 Geo. 3. and 49 Geo. 3. declare the issuing of the commission to be sufficient notice of a prior act of bankruptcy. *Brooks v. Sowerby*, 3 Taun. 165. Overruled, 4 Barn. & Ald. 523.

9. The issuing a commission of bankruptcy is not of itself sufficient notice to all the world of a prior act of bankruptcy having been committed, and therefore if a payment be made to a bankrupt after the issuing of such commission, but before the party

paying has any actual knowledge of the bankruptcy, such payment will be protected. *Sowerby v. Brooks*, 4 Barn. & Ald. 523.

10. Commission of bankruptcy, especially against country bankers, to be executed immediately, without waiting the time allowed by the general order of 1793. *Ex parte Mavor*, 19 Ves. 542.

11. Where a commission of bankruptcy issued against a trader, describing him as "a dealer in cattle, and seeking his trade of living by buying and selling" without the words "dealer and chapman," and at the trial of an action of trespass brought by him against the assignees under the commission, evidence was received of a dealing in hops, and a verdict was found for the defendants as such assignees, which was afterwards set aside and a new trial granted, on the ground that it might operate as a surprise on the plaintiff: Held, on a second trial, that such evidence was properly admitted, as the words "dealer in cattle," were descriptive of the person only, and that the general statement that the bankrupt got his living by "buying and selling," was sufficient to admit evidence of any trading whatever. *Hale v. Small*, 4 Moore, 415.

12. A separate commission having issued against A. and a joint commission against A. and B., the assignees under the separate commission obtained a verdict against C., the Court ordered the money to be paid into Court until a petition pending before the Lord Chancellor to supersede the separate commission should be decided. *Hodgkinson v. Travers*, 1 Barn. & Cres. 257.

COMMISSIONERS.

See ASSIGNMENT, 1. COMMITMENT. SUPERSEDEAS, 3.

1. Commissioners ought not to make affidavits unless they are served with the petition. *Ex parte Husband v. Twynam*, 1 G. & J. 108.

2. The commissioners have jurisdiction under the general order of March 1794, to take an account of the expences attending the sale of mortgaged premises, and to tax the costs of all parties attending the sale. *Ex parte Mathew re Cooper*, 1 G. & J. 342.

3. Where the legislature gives authority to commissioners, and not power to punish disobedience to that authority, the great seal will lend its aid, but not where the legislature has given no authority on the subject. *Ex parte Woolley re Dowman*, 1 G. & J. 395.

4. The commissioners of bankrupts are authorized by the 49 G. 3. c. 121. s. 13. to bring up a bankrupt charged in execution for the purpose of a full disclosure of his estate and effects at any of three meetings under the commission, or any adjournment thereof. *Spence v. Jones*, 5 Barn. & Ald. 705.

5. A bankrupt in the interval between the second and third meetings under his commission, gave a promissory note as a security for a pre-existing debt to a creditor who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: Held, that such security was invalid, and that no action could be maintained upon it. *Hayward v. Chambers*, 5 Barn. & Ald. 753.

6. When the bankrupt is appre-

banded under a judge's warrant pursuant to the statute 5 Geo. 2. c. 30. s. 14., the commissioners have the power of examining him, although the time for his surrender has expired; and if his answers are satisfactory, he is discharged unless indicted; if not, the commissioners have the same power of committing as on other examinations, *Ex parte Hunt*, 2 Jac. & Walk. 560.

7. Commissioners of bankruptcy are not liable to an action of trespass for committing a person who does not answer to their satisfaction, when examined before them, touching the estate and effects of a bankrupt. *Doswell v. Impey*, 1 Barn. & Cres. 163.

8. Commissioners of bankruptcy cannot give a bankrupt a protection for an unlimited period of time in order to enable him to make a full disclosure of his estate and effects. *Cloughton, Esq. M. P. v. Leigh*, a prisoner, 1 Barn. & Cres. 652. See *Ex parte Leigh*, 1 G. & J.

COMMITMENT BY COMMISSIONERS.

1. Where the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account, and the bankrupt referred to a written account as the only mode of explaining his trade and dealings; and the last adjournment was made upon his assurance that he would produce such account if further time were given: Held, that such account not being produced, nor any satisfactory reason given for not producing it on the day to which the adjournment was made, the commissioners were justified in committing. *Goddard's case*, 1 G. & J. 45.

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2. A bankrupt is bound to disclose to the commissioners all circumstances relating to his property, notwithstanding that such disclosure may tend to establish an act of bankruptcy. *Pratt's case*, 1 G. & J. 58.

3. A single question, followed by a direct answer, which question is unvaried in terms, and not followed by further examination respecting the transaction, is not ground for a valid commitment. *Walker's case*, 1 G. & J. 371.

4. The whole of the questions and answers should be set out in the warrant of commitment. *Tomlin's case*, 1 G. & J. 373.

5. A bankrupt on the day appointed for his last examination before the commissioners, promises to produce a balance sheet if further time be given, several adjournments take place during a period of ten months, at which adjournments he represents an account in writing to be necessary in order to make the discovery required of his estate and effects, and he promises from time to time to produce a balance sheet. That not being produced at the last adjournment, and no satisfactory reason given by him for not producing it: Held, the commissioners were justified in committing him. *Davie v. Mitford and others*, 4 Barn. & Ald. 356.

6. Semble, that by the 5 Geo. 2. c. 30. the bankrupt is bound to render to the commissioners, if required, an account in writing of his estate and effects. *Ibid.*

7. Commissioners having, on the evidence of third persons, committed the bankrupt for not answering satisfactorily, must state the evidence in hæc verba on the warrant of commitment, and a warrant stating only the effect of the evidence is defective in substance. *Crowley's case*, 2 Swans. 1.

8. A bankrupt answering a question, embodying a statement relative to the acts of a third person, without denying or qualifying that statement is not understood as admitting it. *Crowley's case*, 2 Swans. 1.

9. A bankrupt refusing to be sworn before the commissioners, on the ground that his legal adviser had not arrived: Held, that their warrant for his commitment, stating generally that he refused to be sworn was sufficient, without adding the reason assigned by the bankrupt for his refusal: Held also, that the warrant committing him until such time as he shall submit himself to us, or the major part of the said commissioners by the said commission named and authorized, and take the oath prescribed by law for that purpose, and full answer make to our or their satisfaction to the questions which may be put to him by virtue of the commission, must be understood as implying legal questions. *Nobes v. Mountain* and others, 3 Brod. & Bing. 233.

10. Commission superseded on the petition of bankrupt under commitment for not answering, with the consent of all the creditors. Ex parte *Brown*, 2 Swan. 290.

11. A bankrupt, to a question whether he had not within six months previous to the commission executed two conveyances of his estate and effects, or part thereof, to his son, answered, "not to my knowledge." This answer held to be satisfactory, no further questions having been put. *Norris's case*, 2 Jac. & Walk. 437.

12. It is no objection to a warrant of commitment which recites several examinations that it omits to mention, that the bankrupt who had been committed was discharged at the conclusion of one of the examinations. *Bromley's case*, 2 Jac. & Walk. 453.

13. Where a bankrupt refused to be sworn before the commissioners until his attorney arrived: Held, that a warrant for his commitment by them, stating generally the refusal of the bankrupt to be sworn, was sufficient without assigning the reason for such refusal: Held also, that the warrant committing him until such time as he should submit himself to the commissioners and full answer make to the questions which might be put to him by virtue of the said commission, sufficiently pursued the terms of the oath to be taken by the bankrupt, and the 16th section of the statute 5 Geo. 2. c. 30.; as it must be intended that the questions which might be put by the commissioners would be legal questions; and where the bankrupt was committed to Newgate under a judge's warrant, granted on the certificate of the commissioners, for not appearing to their summons, and afterwards brought before them by warrant, to make disclosure of his estate, if he refuses to be sworn and examined as to such estate, the commissioners may commit him under the 14th section of that statute, as when he was brought before them the warrant and authority of the judge were at an end and determined. *Nobes v. Mountain*, 7 Moore, 39.

CONDITION.

Bequest to trustees in trust to pay C. H. an annuity during his life, provided that if C. H. should by any ways or means whatsoever sell, dispose of, or incur the right, &c. he might have for life, then his interest to cease, and the trustees to apply the same for the benefit of his children: Held, that on the bankruptcy of C. H. his interest ceased,

and his children became entitled. *Cooper v. Wyatt and others*, 5 Mad. 482.

CONSOLIDATION OF ESTATES.

The Court will not order a consolidation of bankrupts' estates without a reference; though in pursuance of a resolution of creditors at a meeting called for that purpose. *Ex parte Strutt re Higton*, 1 G. & J. 29.

CONTINGENT DEBT.

See Proof.

CONTRIBUTION.

See Jurisdiction, 1.

COPYHOLD ESTATES.

1. Where a copyhold is sold under a commission of bankruptcy, a good title is made by a bargain and sale from the commissioners to the purchaser. *Ex parte Holland re Harvey*, 4 Mad. 483.

2. A testator devised a copyhold estate to his wife for life, remainder to his son and the heirs of his body, and there was no custom in the manor to entail copyholds: the son survived his mother and had issue; and having become bankrupt, he died before admittance, and before any bargain and sale of the estate was executed by the commissioners: Held, that he took a fee simple conditional at common law, and that the commissioners might execute a

valid conveyance of the estate after his death pursuant to 1 Jac. c. 15. s. 17. *Doe v. Clark*, 5 Barn. & Ald. 458.

COSTS.

See Assignees, 18. 20. *BANKRUPT*, 1. *CERTIFICATE*, 19. *COMMISSIONERS*, 2. *EQUITABLE MORTGAGE*, 1. *JURISDICTION*, 1. *MESSENGER*, 1. *PETITIONING CREDITOR*, 4. 7. *PETITIONING CREDITORS' DEBT*, 2. *PRACTICE*, 9. 18. 29. *SOLICITOR'S BILL*. *SUPERSEDEAS*, 5. 9. *SURRENDER*, 2.

1. Bankrupt not allowed the costs of his petition to supersede the commission, where he was in a situation to try its validity at law in the first instance. *Ex parte Marks re Marks*, 1 G. & J. 70.

2. No costs given upon a petition by joint creditors to prove against the separate estate, there being no joint effects or solvent partner. *Ex parte Bradshaw re Aubrey*, 1 G. & J. 99.

3. Equitable mortgagee held to be entitled to costs out of the proceeds, upon the usual petition for sale, though the written instrument referred to, and required the aid of parol testimony to explain it. *Ex parte Vauxhall Bridge Company re Leyburn*, 1 G. & J. 101.

4. A creditor of the bankrupt, previous to the commission, obtained a verdict against him for a nominal sum, in an action for money had and received, subject to a reference. After the issuing of the commission, the award was made and judgment entered up for the debt, and costs awarded: the creditor having proved his debt, took the bankrupt in execution for the costs: ordered to dis-

charge him. *Ex parte Haynes re Haynes*, 1 G. & J. 107.

5. Upon the bankrupt's petition to supersede, an action was directed to be brought by the bankrupt against the assignee to try the validity of the commission, the petitioning creditors to defend the action; and it was ordered, that the proceedings under the commission should be stayed until further order, and all further directions in the matter of the petition were reserved until after the trial, with liberty to apply. The bankrupt having failed in the action, was taken in execution for the costs, and now, upon his petition to be discharged from that arrest, he was ordered to be discharged. *Ex parte Gregory re Gregory*, 1 G. & J. 177.

6. Held, that "the costs of and occasioned by the application" include the costs of an interlocutory order made in pursuance of part of the application. Costs of the day can only be obtained by a special order at the time. *Ex parte Green re Harris*, 1 G. & J. 188.

7. Bankrupt had before his bankruptcy commenced an action, which was subsequently prosecuted by his assignees and failed, and the bankrupt having obtained his certificate, was taken in execution for costs. Application by the bankrupt for payment of these costs out of the estate, refused, on the ground of the bankrupt having by his wilful misrepresentations induced the assignees to pursue the action. Where bankrupt has acted fairly, he is entitled to this protection. *Ex parte Seaman re Seaman*, 1 G. & J. 260.

8. Party committed under an order in bankruptcy for disobedience to an order for payment of money and costs which were taxed, afterwards becoming bankrupt and obtaining his certificate, ordered to

ELECTION.

be discharged. *Ex parte Dick re Harper*, 1 G. & J. 261.

9. Where, in an action upon the contract, the verdict is before and the judgment after the bankruptcy, the costs are proveable. *Ex parte Poucher re Cable*, 1 G. & J. 385.

10. If the verdict as well as the judgment be after the bankruptcy, the costs are not proveable, though it seems they are barred by the certificate. *Ex parte Poucher re Cable*, 1 G. & J. 385.

D.

DEMURRER.

See INFORMATION, 1. *SUIT*, 1, 2.

DEPOSITIONS.

See CERTIFICATE, 6.

DESCRIPTION.

See COMMISSION, 1, 2, 3. 11.
PRACTICE, 33.

DIVIDENDS.

See INTEREST, 3. *EVIDENCE*, 12.

E.

ELECTION.

See PROOF, 12.

1. Petitioning creditor under the first commission being a joint creditor, held entitled to his election

under the second commission to prove against the joint or separate estate. *Ex parte Smith re Martelly*, 1 G. & J. 256.

2. Proof or claim by a creditor for any debt operates under the 49 G. 3. c. 121. s. 14. as a relinquishment of an action previously brought for a distinct demand; but not, as it seems, of an action subsequently brought for a distinct demand. *Ex parte Glover re Glover*, 1 G. & J. 270.

3. A creditor accepting an assignment of a debt proved, is substantially a creditor proving a debt within the 49 G. 3. c. 121. s. 14., and thereby relinquishes an action brought by him against the bankrupt. *Ex parte Taylor re Herbert*, 1 G. & J. 399.

4. Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiffs in divers large sums of money for goods sold; and that for securing to the plaintiffs the said several sums of money, defendant before his bankruptcy accepted a bill of exchange drawn by the plaintiffs for and in payment of one of the said several sums of money in which he was so indebted as aforesaid, and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money in which he so stood indebted as aforesaid. The plea then stated that the defendant had duly become bankrupt, and that the bills of exchange mentioned in the declaration were proveable under the commission, and that the plaintiffs being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission not only with respect to the debt so

proved, but also as to the bills and debts mentioned in the declaration: Held on demurrer, that this plea could not be supported; first, because the proof of a debt under a commission of bankruptcy cannot be pleaded in bar to an action at law for the same debt; secondly, that the election of the creditor to take the benefit of the commission is confined by the 49 Geo. 3. c. 121. s. 14. to the debt actually proved, and does not extend to distinct debts, *ejusdem generis*, due at the same time. *Harley v. Greenwood*, 5 Barn. & Ald. 95.

5. A creditor who has a right to elect between joint and separate estate, must make his election before a dividend is declared of the estate against which he has proved; his election is gone if he does any act in the character in which he has proved. *Ex parte Husband re Blackburn*, 5 Mad. 419.

6. Where an attorney, in order to get possession of papers belonging to A. B., in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference not revocable, &c.: Held, that A. B. having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 Geo. 3. c. 121. s. 14. so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the master. *Ex parte Hughes*, 5 Barn. & Ald. 482.

450 EQUITABLE MORTGAGE.

EQUITABLE MORTGAGE.

See LIEN, 4.

1. Equitable mortgagee held to be entitled to costs out of the proceeds, upon the usual petition for sale, though the written instrument referred to and required the aid of parol testimony to explain it. *Ex parte Vauxhall Bridge Company re Leyburn*, 1 G. & J. 101.

2. Messrs. M. & Co. being in possession of all the title deeds of certain leasehold premises belonging to the bankrupt, as a security for a debt due from him, at his request deliver to the solicitor of the original lessor, upon an engagement of redelivery, the original lease and the immediate assignment to the bankrupt, for the purpose of enabling the bankrupt to procure an extension of the term of the lease. The bankrupt receives the lease and assignment from the solicitor of the original lessor, and deposits them with Messrs. C. and V. as a security for money advanced. After the bankruptcy, Messrs. C. and V., upon payment of their claim thereon, deliver the lease and assignment to the assignees under the commission: Held, that Messrs. M. and Co. were, in equity, to be considered as in possession of the lease and assignment, and that they had therefore a priority of lien. *Ex parte Meux re Foot*, 1 G. & J. 116.

3. An agreement by way of deposit of title deeds with a firm of five, one of whom was a nominal partner only, extended by subsequent agreement to the actual partnership of four. *Ex parte Alexander re Tills*, 1 G. & J. 409.

4. Equitable mortgage by deposit of deeds, though not now to be disturbed, disapproved, and not ex-

EVIDENCE.

tended by inference from a legal mortgage to a subsequent advance. *Ex parte Hooper*, 19 Ves. 477.

5. Equitable mortgagees of a bankrupt's estate are not comprehended within the general order of the 8th of March 1794. On the petition of an equitable mortgagee, the Court may in the first instance decide the validity of his claim, and that decision is conclusive on the commissioners. *Ex parte Jennings in re Dawson*, 2 Swan. 360.

EQUITABLE PROVISION TO WIFE.

See WIFE.

ESTATE.

See ASSIGNEES, 4, 12, 14, 15. COPYHOLD ESTATE.

EVIDENCE.

See ACT OF BANKRUPTCY, 14.
TRADING, 7. WITNESS.

1. In a suit against the crown to which the assignees of a bankrupt, who but for his bankruptcy would have been in the same interest as the plaintiffs, are made defendants, the bankrupt himself cannot be examined as a witness for the plaintiffs, although he has released the assignees, because the crown is not bound by the statutes relating to bankrupts. *Crawford and others v. Attorney General and others*, 7 Price, 2.

2. An assignee of a bankrupt who has released his individual claims on the bankrupt's estates, is an admis-

sible witness to prove the petitioning creditor's debt. *Tomlinson v. Wilks*, 2 Brod. & Bing. 397.

3. Declaration made by a bankrupt previous to his bankruptcy, "that he did not owe 10*l.* to any one, and enquired whether a friendly commission could not be issued out against him," is admissible in evidence to shew a collusion between the bankrupt and petitioning creditor to create a debt, although the latter was not an assignee under the commission. *Thomson v. Bridges*, 2 Moore, 376.

4. Where there are infant defendants, they will not be concluded as to the question of bankruptcy, by the production of the commission, &c. under the 49 Geo. 3. 121. s. 11. though no notice has been given on their part of an intention to dispute the commission. *Bell v. Tinney* 4 Mad. 372.

5. The defendants, assignees of a bankrupt, produced under a notice from the plaintiff (in an action for use and occupation) the deed of assignment of the bankrupt's effects: Held, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shewn that the defendants occupied under the deed. *Orr v. Morice*, 3 Brod. & Bing. 139.

6. Upon a trial directed by this Court, the Judge's notes are not evidence of what passed on the trial. *Ex parte Learmouth in re Walker*, 6 Mad. 113.

7. Declarations made by a bankrupt before and after the issuing of a commission against him, are inadmissible to shew that it was founded on fraud. *Lloyd v. Heathcote*, 5 Moore, 129.

8. In trover by the assignees of a bankrupt against the sheriff, for goods

taken in execution by the latter, the declaration of the bankrupt previous to his bankruptcy having been admitted to shew that the commission had been founded in a collusion between the bankrupt and the petitioning creditor, to create an apparent petitioning creditor's debt: Held, that the evidence was well received, though the petitioning creditor was not one of the assignees under the commission. By the three Judges (Gibbs, C. J. absent). *Thompson v. Bridges*, 8 Taunt. 336.

9. In an action for goods sold and delivered, brought by the assignees of A., against whom a commission of bankruptcy issued, on the petition of certain persons, who alleged that a debt was due to them as assignees of B., a bankrupt: Held, that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission (no notice of an intention to dispute it having been given), and that it was not incumbent on the plaintiffs to give any other evidence that the petitioning creditors were the assignees of B. *Skaise*, assignee of *W. Allan*, a bankrupt, v. *Howard*, 2 Barn. & Cres. 560.

10. A. B. being secretary to the Norwich Life Insurance Company, and also to the Norwich Fire Insurance Company, offers a petition to the Great Seal for a commission of bankruptcy in respect of a debt due to himself, the debt being in fact due to the Norwich Fire Insurance Company. The affidavit and petition are not evidence in an action by the assignees under the commission against the Norwich Life Insurance Company. *Guthrie* and another v. *Fiske* and another, 3 Starkie, 151.

11. A statement in a deposition before the commissioners of bank-

rupts, that a party promised to meet one of his creditors at a given place and failed to do so, is not sufficient evidence to establish an act of bankruptcy under 49 Geo. 3. c. 121. s. 10. *Tucker v. Jones*, 2 Bing. 2.

12. Depositions taken upon a commission of bankruptcy are not under 49 Geo. 3. c. 121. of a petitioning creditor's debt. *Cooper v. Machin*, 1 Bing. 426.

13. In an action for the use and occupation of premises, against the assignees of a bankrupt: Held, that the deed of assignment of the bankrupt's effects produced by the defendants at the trial, under a notice from the plaintiffs so to do, was admissible in evidence without proof of the execution by the subscribing witness, as it appeared that two of the assignees had continued to occupy the premises after the act of bankruptcy, and thereby claimed a beneficial interest under the deed. *Orr v. Morrice*, 6 Moore, 347.

14. On the 3d of July, W., who had appointed to meet L. respecting some accounts in which W. was interested, broke his appointment and departed for France, leaving for L. a letter, in which he said, "I shall be back I hope in ten days; in the mean time I shall make proposals to your son's creditors. I will write to B. and S., so do not feel uneasy about them, or any of your son's friends." On the next day he wrote to L. a letter from Calais, in which he said, "If you could accompany my brother, you would contribute to get the business settled a moment the sooner:" and on the 2d of August he wrote from Paris, saying, "As some of B. L.'s (L.'s sons) creditors have threatened to make me solely responsible, I am under the necessity of remaining in France." Held, that

these letters were admissible in evidence, and sufficient to establish an act of bankruptcy, by shewing with what intention W. departed the realm. *Rawson v. Haigh*, 2 Bing. 99.

EXAMINATIONS.

See WITNESS.

The Court will not restrain commissioners in their examinations, upon an allegation that the object of the examination is to procure evidence against the parties examined, as to penalties incurred by gaming. *Ex parte Burton re Abithol*, 1 G. & J. 90.

EXECUTION CREDITOR.

See PROOF, 5.

EXECUTOR.

See PETITIONING CREDITOR, 3. SET-OFF, 1, 2.

1. Executor bankrupt cannot, without an order of the Court, prove under his own commission, in respect of a debt due from him to the testator's estate. *Ex parte Shaw v. Howard and Gibbs*, 1 G. & J. 127.

2. The order admitting an executor to prove, is not declaratory of an anterior right, but originates his title. *Ex parte Shaw re Howard and Gibbs*, 1 G. & J. 163.

EXECUTION.

See ACTION, 16. CERTIFICATE, 19.
PROOF, 5.

1. A commission of bankruptcy having been issued against the Defendant, in custody under a *ca. sa.*, the Plaintiff, in order to prove his debt, discharged the Defendant from the execution. The commission having afterwards been superseded, the Plaintiff took the defendant in execution again. The Court, from various affidavits, suspecting that the commission and supersedeas had been fraudulently concerted, refused to discharge the Defendant on motion. *Baker v. Ridgway*, 2 Bing. 41.

2. A Plaintiff will not be permitted, on motion, to quash a writ of *capias ad satisfaciendum* sued out by him and lodged with the sheriff, for the purpose of fixing the Defendant's bail, in the usual course, on the return of non est inventus, where the Defendant has voluntarily surrendered in discharge of his bail before the return of the *ca. sa.*, and afterwards become bankrupt; although the Plaintiff undertake to enter an exoneretur on the bail-piece, and make an affidavit that it was never intended to take the Defendant in execution upon the *ca. sa.* Quere, how far the practice of making such formal return of non est inventus is sustainable, or whether it is not an abuse of the process. *Stott v. Smith*, &c. 8 Price, 512.

EXPUNGING PROOF.

See PROOF, 24, 25.

Where a creditor proved in respect of several bills of exchange drawn by the bankrupt and discounted by the creditor, and one of those bills was sub-

sequently wholly paid: Held, that so much of the proof as related to that bill must be expunged. *Ex parte Barratt re Cowell*, 1 G. & J. 327.

EXTENT.

1. Local commissioners for the affairs of taxes issued their warrant under the 43 Geo. 3. c. 99. s. 41 and 52. for seizing and securing the real and personal estate of a collector refusing to pay over money received by him, but as matter of arrangement did not proceed to sell the property so seized under such warrant, which had been issued expressly to secure a certain sum of money said to be due from him to the crown. Five days after, the solicitor for the taxes (the collector being declared a bankrupt on that day) issued extents, under which was taken not only the property already secured by the warrant of the commissioners of taxes within their jurisdiction, but also other real and personal property in other places, for the purpose of levying precisely the same sum claimed on the same account, but it being eventually discovered that the sum actually due to the crown for monies received by the collector, amounted to very considerably more than the sum for which the warrant (and consequently the extent) had issued, but not to double the amount, the crown sold all the property, and applied the proceeds in discharge of the public debt, in aid of the parish, as far as it extended to satisfy it, which produced a net sum, much larger than the sum sought to be raised originally, but not sufficient to pay the whole debt, which sum so produced was paid into the receipt of the exchequer in August 1817. Un-

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der such circumstances this Court refused to make absolute a rule (founded on the objection, that it was having recourse to two modes of proceeding for the same debt) granted to shew cause (obtained on a motion made in July 1819) why it should not be referred to the deputy remembrancer, to take an account of the money due to the crown with a view to get the surplus, beyond the amount of the sum originally sought to be levied, paid back to the assignees of the bankrupt; holding, that for such a debt so incurred in such a character, the crown was entitled to use every mode of proceeding given by the statute. Delay in the application, although not conclusive against assignees, strongly prejudices their claim. *The King v. Jones*, 8 Price. 108.

F.

FACTOR.

See *LIEN*, 6. 8.

FELONY.

See *BANKRUPT*, 4.

FRAUDULENT CONVEYANCE.

Where A. by deed assigned all his effects at W. to trustees, for the benefit of certain creditors for four years, and the trustees were empowered to sell at the expiration of two years, or sooner if A., should direct, and apply the proceeds of the

sale in discharge of the debts of such creditors, who covenanted that A. might continue at home or abroad, and that they would not molest him for two years from the date of the deed: Held, that such assignment was valid, and not within the statute 13 Eliz. c. 5. and that the property was thereby protected against a judgment creditor who had sued out execution against A. after the deed was executed. *Goss v. Neale*, Bart. 5 Moore, 19.

FRAUDULENT PREFERENCE.

See *VOLUNTARY PAYMENTS*.

Where the defendant having agreed to lend to two persons who afterwards became bankrupts 200*l.*, to be applied to a specific purpose, drew a cheque on his banker for that sum, and delivered it to them before their bankruptcy; and they, not having used the cheque, returned it to the lender after having committed an act of bankruptcy: Held, that their assignee could not maintain trover for the cheque. *Moore v. Barthrop*, 6 Barn. & Ald. 5.

FRIENDLY SOCIETY.

Whether a petition under the tenth section of the friendly society act should not be entitled in the bankruptcy, *Quære*. Order made under that section against the estate of a bankrupt trustee, one of several trustees and his solvent co-trustees. *Anon.* 6 Mad. 98.

H.

HABEAS CORPUS.

See COMMITMENT.

1. The Lord Chancellor can issue the writ of *habeas corpus* at common law, in vacation. *Crowley's case*, 2 Swans. 1.

2. When a bankrupt committed by the commissioners is brought up by *habeas corpus*, notice must be given to the assignees, and notice on Saturday afternoon for Monday, unless his right to be discharged is perfectly clear, is not sufficient. *Bromley's case*, 2 Jac. & Walk. 453.

3. Where a bankrupt was committed for not sufficiently answering the Court upon *habeas corpus*: Held, that the statute 5 Geo. 2. c. 3. s. 18. did not authorize the Court to receive affidavits in explanation of the parties' conduct and answers before the commissioners, but only to inquire into the truth of the facts stated on the face of the return to the *habeas corpus*. *Ex parte James*, 2 Ch. 110.

I.

INFANT.

See EVIDENCE, 4.

INFANT TRUSTEE.

The infant heir of a messenger, to whom in bankruptcy a provisional assignment had been made, and who died before the choice of assignees: Held to be a trustee of the real state of the bankrupt, within the

statute of Anne. *Ex parte Carter re Portsmouth Bank*, 5 Mad. 81.

INFORMATION.

The crown is entitled under the 45 Geo. 3. c. 58. to an account of unclaimed balances remaining in the hands of army agents on money intrusted to and received by them on account of officers belonging to the several regiments, &c. for which they are or may have been agents: and also a statement of their names and rank from such army agents or their representatives: and that for any period of time during their agency, however remote: and the Attorney General may compel to furnish such an account by information in this Court. Demurrer by bankrupt army agent and his assignees to an information, praying that they might render such an account, over-ruled. *Attorney General v. Ross*, 8 Price, 190.

INJUNCTION.

See PARTNERS, 1, 2.

ASSIGNEES, 17.

Injunction, *ex parte*, to restrain the assignees from selling the bankrupt's effects. *Ex parte Figes re Figes*, 1 G. & J. 122.

INSPECTOR.

Inspector appointed for separate estate where joint creditors had no interest. *Ex parte Batson re Bell*, 1 G. & J. 269.

INTEREST.

See PETITIONING CREDITOR'S
DEBT, 8.

1. Creditors under a commission entitled to interest, out of a surplus only where interest accrues due upon contract express or implied. Ex parte *Boyd re Boyd, Benfield and Drummond*, 1 G. & J. 285.

2. Interest subsequent to the commission cannot be charged upon the estate, directly or indirectly, except in case of surplus. Ex parte *Paton re Dunsmuir and Gardner*, 1 G. & J. 332.

3. Interest payable on a dividend at 5 per cent. Ex parte *Loxley re Langham*, 1 G. & J. 345.

4. A bill of exchange drawn by A. for 98*l.* 11*s.* was dishonored and duly protested. A. afterwards became bankrupt, and the interest on the bill amounted to 1*l.* 17*s.* at the time of the issuing of the commission: Held, that this interest could not be added to the principal, so as to form a good and sufficient petitioning creditor's debt on which to found the commission of bankrupt against A. In re *Sandbrook Burgess*, 8 Taun. 660.

INTERLOCUTORY ORDER.

See COSTS, 6.

ISSUE.

See PRACTICE.

J.

JOINT AND SEPARATE COMMISSION.

See PROOF.

Where a joint creditor sues out a commission against A. "as surviving partner of B." he can claim only against the joint estate. Ex parte *Barned re Tarlton*, 1 G. & J. 319.

JOINT CREDITORS.

1. Joint creditors who have taken joint effects in execution subsequently to an act of bankruptcy by one of the partners, cannot retain them against the assignees under a separate commission, afterwards issued by another joint creditor against that partner. In the matter of *Weiss*, 1 Jac. & Walk. 605.

JURISDICTION.

See SOLICITOR, 1. COMMISSIONERS 2.
SUIT, 2.

1. Where a commission is superseded at the costs of the petitioning creditors, and some of them pay the whole costs, the court has no jurisdiction in bankruptcy to order the rest of the petitioning creditors to contribute. Ex parte *Wilmshurst re Wigney and Seymour*, 1 G. & J. 4.

2. The court has jurisdiction to remove the persons nominated by the creditors as assignees before the execution of the assignment. Ex parte *Shaw re Howard and Gibbs*, 1 G. & J. 127.

3. The bankrupt deposited with A. the title deeds of premises which he had previously mortgaged to

R. & Co. After the bankruptcy it was agreed between R. and Co., A., and the assignees, that the assignees should sell the premises, and apply the proceeds in payment of R. and Co. and A. Upon a petition by the solicitor of the bankrupt claiming a lien by deposit of the title deeds of the premises prior to A.: Held, that there was no jurisdiction in bankruptcy to determine the priority of lien between A. and the petitioner; and that A. was not precluded from objecting to the jurisdiction by filing affidavits as to the merits. *Ex parte Allison re Downing*, 1 G. & J. 210.

4. Purchaser of bankrupt's mortgaged estate, sold before the commissioners under the general order, upon petition in the bankruptcy, ordered to complete his purchase, *Ex parte Gould re Harvey*, 1 G. & J. 281.

5. Bill by assignees to restrain a bankrupt from further proceedings at law to impeach the commission will not hold: the remedy is by petition. *Kirkpatrick v. Dennett*, 1 G. & J. 300.

6. No jurisdiction in bankruptcy to compel a bankrupt to perfect a bill of sale of a ship. *Ex parte Stewart re O'Brien*, 1 G. & J. 344.

7. No jurisdiction in bankruptcy upon a petition headed "In Chancery." *Ex parte Glandfield re Glandfield*, 1 G. & J. 387.

8. If a creditor has proved, it gives the Court a jurisdiction different from that which it is authorised to exercise where there has been no proof. *Ex parte Hilton re Oliver*, 1 Jac. & Walk. 467.

L.

LANDLORD AND TENANT.

See PAYMENT AFTER ACT OF BANKRUPTCY.

LEASE.

1. Where the assignees of a bankrupt who was possessed of a term, part of which he had underlet to another, released such undertenant, and on being afterwards asked by the lessor to elect, refused to take the original lease: Held, that this did not amount to an acceptance by them, and that they were not liable as assignees of the term, *Hill v. Dobie*, 2 Moore, 342.

2. A release of an undertenant by the assignees of a bankrupt does not amount to an acceptance by them of the original lease. *Hill v. Dobie*, 8 Taun. 325.

LEGACY.

See PRACTICE, 3. PROOF, 10. 13. SET OFF, 1, 2.

LESSOR AND LESSEE.

1. A. the original lessee of a term of years, assigned the residue to B. and C.; B. on the assignment gave a bond to A. conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for indemnifying A. against the non-performance of the covenants. B. and C. having become bankrupts, and the bond

being forfeited before their bankruptcy, A. brought an action against B. on the bond, and assigned breaches, first, non-payment of the rent by B. and C., and secondly that an action was commenced against him by the lessor for its recovery in which costs had been incurred to the amount of 50*l*. The defendant pleaded bankruptcy generally, and two pleas founded on 49 Geo. 3. c. 121. s. 19. Held, that A. was entitled to recover, as he could not prove under the commission for the damages which had accrued previous to the bankruptcy, as it did not appear that he had paid them to the lessor; and that the 19th section of the statute 49 Geo. 3. did not extend to the lessee and his assignees of a lease, but must be confined to the lessor and lessee.

Young v. Taylor, 2 Moore, 326.

2. Plaintiff, a lessee; assigned his term to the defendant, who thereupon gave to the plaintiff a bond to indemnify him against the rent and covenants in the lease. The bond was forfeited: the defendant afterwards became bankrupt, and the assignee accepted the lease. Held, that the plaintiff could recover on the bond, as he had not actually made any payment before the bankruptcy; and was therefore unable to prove under the commission; and as the court considered the statute 49 G. 3. c. 121. s. 19, not to apply to collateral securities, or to an assignee, but to be confined to the case of a lessee.

Young v. Taylor, 8 Taun. 315.

LIEN.

See EQUITABLE MORTGAGE. MORTGAGE, 5. PROCEEDINGS, 1.

1. A creditor having a lien on the property of the bankrupt for his

debt, held to be concluded by proving his debt, voting in the choice of assignees, and signing the certificate; and ordered to deliver up the property on which he had a lien. Ex parte *Solomon re Anbusson*, 1 G. & J. 25.

2. Covenant between vendor and purchaser that purchase money should be paid within two years after re-sale discharges the vendor's lien. Ex parte *Parkes re Parkes*, 1 G. & J. 228.

3. Application by vendor, who had not conveyed, for a sale of the premises in discharge of his lien for the unpaid purchase money and to prove for any deficiency, granted. Ex parte *Gyde re Hart*, 1 G. & J. 323.

4. When title deeds are deposited by way of security with a firm upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement for the security of a new sum upon a change of partners. Ex parte *Lloyd re Ablett*, 1 G. & J. 389.

5. Cloths were left by a bankrupt before his bankruptcy with the defendant (a fuller) to be dressed. A balance was then due from the bankrupt to the defendant for work done on other cloths. The assignees having tendered the defendant the sum due for work done on the cloths in his possession, and demanded them, on his refusal to deliver them up: Held, that he had no right to detain them for his general balance, and that the assignees were entitled to recover in an action of trover. *Rose v. Hart*, 2 Moore, 547.

6. On the 15th of October 1817, the defendants as brokers of A. purchased goods of B. and Co. on his account, and agreed with them that such goods should remain on their

premises one month free of rent, and after that time that A. should pay rent until their removal. From the 7th to the 11th of November, the defendants shipped part of the goods by the order of A. who directed the remainder to be left on B. and Co.'s premises till further orders. Shortly afterwards B. and Co. requested the defendants to remove them, which they did not, but on the 9th and 10th of December, without any direction from A., they removed them to their own premises, a docket having been previously struck against A. on the 6th, and a commission issued on the 10th: Held, that the possession continued in A., and that the defendants had no lien on the goods for a general balance due from him to them as his brokers. *Taylor v. Robinson*, 2 Moore, 730.

7. A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter drew bills upon A., which he accepted on the security of those shares standing in his name, and these bills were assigned by B. for a valuable consideration to C., a British subject. Before they became due, B. authorized A. by letter to sell the bank shares in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured. B. also afterwards became bankrupt. C. by process in the foreign country attached the bank shares, still standing in the name of A., for the debts due to him upon the bills, and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from B. to A. and afterwards to retire the bills. Under

this decree, C. received a certain sum of money on account of the bills: Held that the assignees of A. could not recover back this money, as money belonging to B. *Cazenove v. Prevost*, 5 Barn. & Ald. 70.

8. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to J. S. sold the goods to him. The factor afterwards became bankrupt, and on a settlement of accounts between J. S. and the assignees, J. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods brought either by or on the account of the original owner. *Hudson v. Granger*, 5 Barn. & Ald. 27.

9. Defendants, who had a lien on C.'s ship, received from C., then lying in prison, the balance due to them on account of disbursements made on the ship, and they then delivered up the ship's papers to C., C. having become a bankrupt a fortnight after this payment (the imprisonment he was then undergoing being the act of bankruptcy); his assignees sued defendants for the balance so received by them. A verdict having been found for the defendants, with leave for the plaintiffs to move to set it aside, and enter up a verdict for the said balance, the court discharged a rule nisi to that effect, which had been moved for on the ground that the defendants not having stipulated for the payment of their balance as a condition for the surrender of their lien, the payment

ought to be considered as voluntary. *Thompson*, assignee of *Chapman v. Beatson*, 1 Bing. 145.

10. The defendants on the 15th of October, as brokers of M., purchased by his advice and on his account goods of D. & Co. and agreed with them that the goods should remain on the premises of the latter for one month rent free, and that M. after that time should pay for the room they should occupy until their removal. The invoice was made out to M. From the 7th to the 11th of November; the defendants shipped part of the goods by order of M., who directed that the residue should be left on the premises of D. & Co. till further orders from him. The defendants soon afterwards were requested by D. & Co. to remove the residue of the goods, but the defendants did not then comply with that request. A docket was struck against M. on the 6th of December, and on the 9th and 10th of that month, the defendants, without any order from M., removed part of the residue to their own premises. On the 10th a commission of bankrupt issued against M. The court held that the defendants had no possession on which to found their claim as brokers to a lien on the goods so purchased. *Taylor*, assignee of *M'Michael v. Robinson*, 8 Taun. 648.

11. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for costs of an action brought against the bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster*, 2 Barn. & Cres. 616.

MESSENGER.

SEE INFANT TRUSTEE.

Petitioning creditor ordered to pay the messenger his costs as taxed by the commissioners, and the assignees to pay his subsequent costs, where the commission was supersedeable, and considered as superseded. *Ex parte Johnson re Catterson*, 1 G. & J. 23.

MORTGAGE.

1. Where the mortgaged estate of a bankrupt is sold under the order in chancery of March 1794, at the request of the mortgagee, and the mortgagee is the purchaser at the sale, he is liable, in an action for money paid, to reimburse the solicitor under the commission the expenses of the sale. *Bowles v. Perring*, 2 Brod. & Bing. 457.

rupt's estate called on the commis-

2. Where the mortgagee of a bankrupt to direct a sale under Lord Loughborough's order of March 1794, and became the purchaser at such sale: Held, that in an action for money paid, brought by the solicitors to the assignees, he was liable to reimburse them the expenses of advertisements and the commissioners' fees for their attendance to perfect such sale, although the estate sold was insufficient to cover the sum originally advanced by such mortgagee. *Bowles v. Perring*, 5 Moore, 296.

MORTGAGEE.

See *LIEN*.

1. A mortgagee with a power of sale may apply to the court to have the premises sold. Ex parte *Hodgson re Cook*, G. & J. 12.

2. A mortgagee may petition to stay a certificate. Ex parte *Whitechurch re Rood*, 1 G. & J. 71.

3. When the mortgagor in possession was by express contract tenant at will to the mortgagee, held that the mortgagee was not entitled to the crops upon the mortgaged premises at the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners. Ex parte *Temple re Skinner*, 1 G. & J. 216.

4. Whether a mortgagee could, in an action for mesne profits after judgment in ejectment against the mortgagor in possession of the mortgaged premises, recover the value of the crops severed and sold, subsequent to the day of the demise laid in the declaration, but before the delivery of possession by the sheriff, *quære*. Ex parte *Temple re Skinner*, 1 G. & J. 216.

5. Where a mortgagee has without fraud or gross neglect parted with the possession of the title deeds, which are deposited with another person equally innocent, whether the court will take the possession from him. *Quære*. Ex parte *Cawthorne re Foot*, 1 G. & J. 240.

6. A mortgagee may petition to stay a bankrupt's certificate. The circumstances of his not having tendered any proof till the third meeting will not prevent him from presenting such a petition. Where the amount of the mortgage debt was disputed, the certificate was lodged in the bankrupt office till it should be ascertained. Ex parte *White-*

church in re Rood, 2 Jac. & Walk. 548.

MUTUAL DEBTS AND CREDITS.

1. B., a creditor of the bankrupts, assigns his estate and the debts due to him to trustees in payment of his creditors, and afterwards proves his debt under the commission: Held that the assignees under the commission were not entitled to deduct from the dividend on that proof, a sum due from B. to them for costs, upon the dismissal of a bill filed by B. against them, and dismissed subsequent to the assignment and prior to the proof. Ex parte *Whitehead re Kirk*, 1 G. & J. 39.

2. In order to constitute a mutual credit within 5 G. 2. c. 30. s. 28. it must be confined to pecuniary demands on such credits only as in their nature will terminate in a debt. *Rose v. Hart*, 2 Moore, 547.

3. A. previous to his bankruptcy deposited a bill of exchange with B. for the specific purpose of raising money thereon, and B. advanced money on the bill. Held that the assignees of A. were entitled to recover from B. the amount of the bill in an action of trover, they having tendered to B. the money advanced by him, though a general balance remained due from the bankrupt to B., and that this did not form a case of mutual credit within the statute 5 Geo. 2. c. 30. *Key v. Flint*, 8 Taun. 21.

4. A. drew a bill on B. for 400*l.*, which B., who was not then indebted to A. accepted. B., afterwards became indebted to A. in 236*l.* 11*s.* 3*d.* and then drew on him for 163*l.* 8*s.* 9*d.*, the balance of the 400*l.*, and his last bill was sold to C. for its full value,

H H

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to be paid for on a certain day; on that day B. committed an act of bankruptcy, and requested C. to keep the bill at the disposal of A. till B. had paid the bill for 400*l.* as he was not entitled to the money until the bill for 400*l.* was paid. Three days after the bankruptcy A., ignorant of that fact, accepted the bill and afterwards paid the money to C. on an agreement that he should resist any claim of the assignees. The bill for 400*l.* at this time remained overdue and unpaid in the hands of A., and B. was indebted to him in more than the amount of the bill in question: Held, that the assignees of B. could not recover against C., he being in the same situation as A. who had a larger claim against the estate of B., this being considered a case of mutual credit between A. and the bankrupt. *Sheldon v. Rothschild*, 8 Taun. 156.

5. Where J. S. being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were the property of A. and shipped on his account, and A. accordingly, by the desire of J. S., wrote to those merchants, stating the property to be so, and directing them to insure and advance money to J. S. on the goods, which was done: Held, that this was a credit given to A. by J. S. by the delivery of goods in its nature likely to terminate in a debt; and that therefore J. S. having subsequently become bankrupt, A. was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him, it being a case of mutual credit within 5 Geo. 2. c. 30. s. 28. *Easum, assignee of Dowland, v. Cato*, 5 Barn. & Ald. 861.

6. Trover for cloths deposited by the bankrupt, previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed: Held that the defendant was not entitled to detain them for his general balance, for such work done by him for the bankrupt previous to his bankruptcy, for that there was no mutual credit within statute 5 Geo. 2. c. 30. s. 28. *Rose v. Hart*, 8 Taun. 499.

7. Held that a guarantie is merely a contract to indemnify upon a contingency, and being in the nature of a claim for unliquidated damages, it cannot form the subject of a mutual credit under 5 Geo. 2. c. 30. s. 28. *Sampson, assignee of Cook, v. Burton*, 4 Moore, 515.

8. In an action by the assignees of a bankrupt (a merchant and insurance broker) against an underwriter, for a loss which happened after the bankruptcy, the defendant claimed to set off a balance due to him for premiums on policies effected partly as broker and partly on his own account: Held that he was entitled to deduct such balance; the operation of 19 Geo. 2. c. 32. being to make a demand upon the policy an item of mutual account where the underwriter has become bankrupt, though the loss happened after. It must also do so where the assurer has become bankrupt. *Graham v. Russell*, 5 M. & S. 498.

N.

NOTICE OF ACT OF BANKRUPTCY.

Action by the assignees of a bankrupt: notice to a petitioning creditor

of an act of bankruptcy prior to the debt is not to be presumed, although the fact that such a prior act was committed appears on the face of the depositions which are read in evidence to prove the act of bankruptcy on which the commission is founded. *Thackrah v. Wood*, 3 Starke, 141.

O.

ORDER AND DISPOSITION.

See SET OFF.

1. Shares in the Vauxhall Bridge Company, who are seized of real estate, not within the statute of 21 Jac. 1. c. 19. s. 11. *Ex parte Vauxhall Bridge Company re Leyburn*, 1 G. & J. 101.

2. Debts due to a partnership assigned upon the dissolution by the retiring partners to the continuing partners, without notice to the debtors: Held upon the bankruptcy of the partners to remain in the order and disposition of the partnership, within the statute of James. *Ex parte Burton re Fossett*, 1 G. & J. 207.

3. Debts due to a partnership, agreed, upon the dissolution, to belong to one of the partners without notice to the debtors: Held, upon the bankruptcy of the partners, to be in the order and disposition of the partnership, and joint estate. *Ex parte Usborne re Barker*, 1 G. & J. 356.

4. Wine sold by the bankrupt, remaining in the bankrupt's cellars, set apart in a particular bin, and marked with the purchaser's seal, and en-

tered in the bankrupt's books as belonging to the purchaser, not in the order and disposition of the bankrupt. *Ex parte Marrable re Brown*, 1 G. & J. 402.

5. The statutes 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. do not enure to prevent the operation of the statute 21 Jac. 1. c. 19. s. 11. upon British registered ships; therefore, where C. being owner of a ship, conveyed the same to S., but by the consent of S. continued to have the order and disposition until he became bankrupt: Held, that the property passed to the assignees of C., though the transfer was complete under the register acts. *Robinson v. Macdonnell*, 5 Maul. & Selw. 228.

6. Goods were sent from J. G. in London to M. at Sunderland, accompanied with a letter expressing a hope that some of the articles would be approved of, and desiring to have those articles which were not approved of returned as speedily as possible. The letter contained an invoice, headed, "Mr. M. bought of J. G.," wherein the prices of the articles were set down but not carried out. On the evening of the day of the arrival of this letter and these goods at Sunderland, the effects of M. were seized under a *fi. fa.*, and on the following morning his shop was shut up by the sheriff and never re-opened. In an action of trover for these goods, brought by J. G. against the assignees of M., who had been made bankrupt: Held, that the goods did not pass to the assignees under the statute 21 Jac. 1. c. 19. s. 11. *Gibson v. Bray*, 8 Taun. 76.

7. Goods and chattels in 1 Jac. 1. c. 15. s. 5. comprise stock. Where a father (become bankrupt) had previously purchased stock in the name of his son, a minor, and a trustee for him: Held to be plainly within

the mischief. *Brown v. Barlens*, 5 Mad. 53.

8. Furniture, &c. in possession of a bankrupt, according to the title under a trust, does not pass to the assignees under the statute 21 Jac. 1. c. 19. s. 11. *Ex parte Martin*, 19 Ves. 491.

9. The ship registry acts 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. do not tend to repeal or prevent the operation of the statute 21 Jac. 1. c. 19. s. 11. on British registered ships. Therefore, where the owner of a ship assigned his interest in her to J. S. by deed, who came the registered owner, but by his permission the owner continued to have the ship in his possession and exercised all acts of ownership over her until he became bankrupt: Held, that the property in the ship passed to the assignees of such owner, although the register was duly indorsed to J. S. before the act of bankruptcy. *Monkhouse v. Hay*, assignee of *Matthews*, 4 Moore, 549.

10. The registry acts (26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.) requiring ships to be registered in the owner's name, do not affect the provision of the 11th section of c. 19. of 21 Jac. 1. respecting the effect of reputed ownership of goods and chattels. There may therefore be a reputed ownership in ships within that statute, notwithstanding the provisions of the registry act requires the transfer of title to be so made as to render the real ownership conspicuous on the registry to any one who will inform himself of the truth. Thus, where a trader on the brink of bankruptcy assigned his ship, then at sea, to a creditor, with power to sell her in order to pay his own debt out of the proceeds, (unless it should be satisfied in the mean time,) the creditor covenanting by the deed

of assignment to permit the assignor in the mean time to have, hold, and enjoy the said ship, and to take the gains and profits thereof for his own use and benefit; and the trader accordingly from that time continued to keep possession of her and exercise acts of ownership, appointing captains, dispatching her on voyages, repairing, insuring, &c. up to the time of the act of bankruptcy and long after, and when the commission of bankruptcy issued against him: Held, that the bankrupt had the possession, order, and disposition of the ship, with the consent of the true owner and proprietor, and was the reputed owner within the statute at the time of his bankruptcy; and that the property in her passed to the bankrupt's assignees under the commission, notwithstanding the transfer had immediately after the assignment procured the certificate of the registry to be properly indorsed, and a new register was very shortly afterwards obtained in his own name, and he had done every thing in his power which was necessary to render himself the registered owner of the ship. *Monkhouse v. Hay*, assignee of *Matthews*, 8 Price, 256.

11. A ship builder contracted with B. to build a ship for him and to complete her in April 1819. The latter was to pay for her by four instalments, the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched. Before the 25th of June 1819, the ship was measured with the builder's privity, to the intent that B. might get her registered in his name. On the 25th of June the ship-builder signed the usual certificate of her building, and on the 26th the ship was registered in B.'s name, and on the same day the third instalment was paid. On

the 30th of June A. committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of July, the ship not being then completed or launched, the defendant, and a crew hired by him, took possession of her, and a rudder and cordage, the former of which was made by the ship-builder, and the latter bought by him for the express purpose of completing the ship: Held, first, that the legal effect of the ship-builder's having signed the certificate to enable B. to have the ship registered in his name, was to vest the general property in the ship in B. from the time the registry was completed: Held, secondly, that as the rudder and cordage were made and bought by the ship-builder specifically for the ship, they were to be considered as parts of the ship, and that the property in them also vested in B.: Held, thirdly, that the property was not in the possession of the bankrupt as reputed owner within 21 Jac. 1. c. 19.: Held, fourthly, that although the general property in the ship was vested in B., yet as A. had not parted with the possession, and as he would have had a lien upon the ship for the amount of the fourth instalment if he had completed it, that the taking possession of the ship by B. without tendering the amount of the fourth instalment, or so much thereof as was due, provided any thing was due, was wrongful, and consequently that the assignees of A. were entitled to recover from B. the amount of the fourth instalment, provided the expense necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expense. *Wood, assignee of Alexander Paton, against Russell*, 5 Barn. & Ald. 942.

12. In an action by the assignees

of a bankrupt, brought to recover property in the bankrupt's possession as reputed owner, the plaintiffs proved that the bankrupt had been once the real owner of the goods in question, and that he had continued in possession of them until he committed an act of bankruptcy: Held, that this was *prima facie* evidence that he continued in possession as owner, and that it then lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant proved, that long before the act of bankruptcy, the goods had been seized under an execution at the suit of a creditor, by the sheriff, and that they were conveyed by bill of sale to the creditor, and that he afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of his bankruptcy. Soon after the bill of sale was executed, the creditor's initials were marked on all the goods: Held, that this was no evidence of the notoriety of the change of property, and consequently that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. *Lingard v. Messiter*, 1 Barn. & Cres. 308.

13. Where A. and B. were partners, but the whole of the business was carried on by and in the name of A., B. never appearing to the world as a partner, and at the dissolution of the partnership by effluxion of time, all the partnership stock and effects, by agreement between them, were left in A.'s hands, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by B. A. having continued to carry on the business as before for a year and a half, when he became bankrupt: Held, that all the partnership

property and effects so left in A.'s hands, and also the debts due to the concern passed to his assignees, being in the order and disposition of the bankrupt within the intent and meaning of the 21 Jac. c. 19. s. 11.

14. A trader having goods lying in wharf, deposits blank delivery notes with a creditor to cover advances made, and becomes insolvent. The creditor, upon notice of the insolvency, fills up the blanks with his own name, and takes possession of the goods on the day before the trader commits an act of bankruptcy. In trover by the assignees against the creditor, held, that the goods so taken possession of were not within 21 Jac. 1. c. 19. s. 11. Held also, that goods lying in the bankrupt's name on any part of the day of the bankruptcy, were within the statute. *Arbouin v. Williams*, 1 Ryan & M. 72.

15. Held, that goods of the bankrupt lying in wharf in the names of his agents, and for which he had given delivery orders in his own name, were not within the statute, there being no reputed ownership. *Ibid.*

P.

PARTNERS.

See ORDER AND DISPOSITION, 2.
PROOF, 6, 7, 18, 19, 27.

1. An agreement between A., a merchant, and B., a broker, that the latter should purchase goods for the former, and in lieu of brokerage should receive for his trouble a certain proportion of the profits arising

from the sale, and should bear a proportion of the loss, does not vest in B. any share in the property so purchased, or in the proceeds of it, although it may render him liable as a partner to third persons. *Smith v. J. Watson*, 2 Barn. & Cres. 401.

2. On a separate commission against one partner, the assignees took possession of the partnership property, and were about to sell it. Injunction on filing of bill and affidavits granted to restrain the sale. *Allen v. Kilbre*, 4 Mad. 464.

3. A solvent partner winding up the partnership concerns, is entitled to prove, under the commission against the bankrupt partners, the share of the loss or deficiency which each partner ought to have borne, as a debt against his separate estate. *Ex parte Watson re Sheath*, 4 Mad. 477.

4. Upon an exception to a master's report, stating the capital and stock in trade of a partnership to consist, at the time of the bankruptcy of one of the partners, of the estimated value of the dead stock employed in it; it was referred back to the master, to state what was the amount of the capital, and also of the stock in trade at that time, in order to adjust the amount of subsequent profits to which the assignees of the bankrupt partner were to be entitled, as against the other partners who had continued to trade with the partnership property after the bankruptcy. *Crawshaw v. Collins*, 1 Jac. & Walk. 267.

5. Where one of two partners who were country bankers became bankrupt, and defendants being holders of their notes, obtained payment of part of them from the London banker at whose house they were payable out of the funds in their hands belonging to the country bank, and the

PAYMENT AFTER BANKRUPTCY. PETITIONING CREDITOR. 467

solvent partner, knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to defendants in payment of the residue of the notes in their hands, and afterwards became bankrupt: Held, that the assignees could not recover from defendants the monies so paid to them by the London banker, nor the proceeds of the said bill. *Harvey*, assignee of *M. B. Harvey*, against *Crickett*, 5 Mau. & Selw. 336.

PARTNERSHIP.

See ORDER AND DISPOSITION, 2. 3.
13. PARTNERS. RECEIVER.

PARTNERSHIP ACCOUNTS.

See CERTIFICATE, 9.

PAYMENT AFTER AN ACT OF BANKRUPTCY.

See LIEN, 9.

1. A bankrupt proposed, after an act of bankruptcy, to dispose of his lease, which was a beneficial lease; the purchaser refused to buy unless five quarters' rent due to the landlord were first paid: after negotiation between the bankrupt and the landlord, who knew the bankrupt's situation, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises, but the landlord having a right of entry: Held, that the bankrupt's assignee could not recover from the landlord

the rent so paid him. *Mayor*, assignee of *Pyne*, v. *Croome*, 1 Bing. 261.

PAYMENTS TO BANKRUPT.

Where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bona fide* without knowledge of the bankruptcy: Held that the assignees under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 J.1. c. 15. s. 14. *Cash* v. *Young*, 2 Barn. & Cres. 413.

PETITION IN BANKRUPTCY.

See JURISDICTION, 5. 7. SUIT, 2.

PETITIONING CREDITOR.

See ELECTION, 1. JOINT AND SEPARATE COMMISSION. MESSENGER. PRACTICE, 8. SUPERSEDEAS, 11.

1. The petitioning creditor is bound to give every information in his power, upon every subject which comes within his knowledge, as petitioning creditor. *Ex parte Graves* re *Weston*, 1 G. & J. 86.

2. Though the commission is not opened, the petitioning creditor cannot proceed at law if it be capable of prosecution. When a commission is not prosecuted so far as to give an interest in it to others, the petitioning creditor may obtain a *superedeas* as of course, unless the bankrupt oppose. *Ex parte Prowse* re *Prowse*, 1 G. & J. 92.

3. Petitioning creditor dying between the issuing and the opening of

the commission, his executors permitted to prove the debt before the commissioners at the opening. Ex parte *Winwood re Parker*. 1 G. & J. 252.

4. Petitioning creditor cannot petition to be paid his taxed bill by a removed assignee, unless he charges collusion. In re *Gibson*. 1 G. & J. 903.

5. Petitioning creditor, being unable to obtain adjudication under the commission sued out by him, permitted, under the circumstances, to take out another commission, directed to another list upon the same docket papers. Ex parte *Stead re Liddard*. 1 G. & J. 301.

6. Attendance of the petitioning creditor at the opening of the commission, not dispensed with on the ground of inconvenience to himself. Ex parte *Williamson*, 1 Jac. & W. 240.

7. Petitioning creditor allowed his costs of resisting successfully an application to supersede the commission out of the bankrupt's estate. Ex parte *Bottomley re Crowther*, 5 Mad. 91.

8. A creditor being ignorant that an act of bankruptcy had been committed by his debtor, executed a composition deed for the amount of his debt, and received a dividend under it: Held, that he might, notwithstanding, become a petitioning creditor, in respect of the original debt. Doe dem. *Pitcher v. Anderson*, 5 Maul. & Selw. 161.

PETITIONING CREDITOR'S BILL.

The provision in the statute 5 G.2. c. 30. s. 25. for taxation of the petitioning creditor's costs, on the day

appointed for the choice of assignees, is merely declaratory. Ex parte *Haynes re Ring*, 1 G. & J. 35.

PETITIONING CREDITOR'S DEBT.

See SEQUESTRATION, 1.

1. The husband alone may sue out a commission upon a promissory note given to the wife, *dum sola*. Ex parte *Barber re Shaw*, G. & J. 1.

2. When a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill of costs taxed, if the bankrupt, at the time of his bankruptcy, was not concluded. Ex parte *Prideaux re Symes*, 1 G. & J. 28.

3. C., before the act of bankruptcy, accepts, for the accommodation of the bankrupt, a bill of exchange drawn by him, and, after the act of bankruptcy, pays the amount of the bill to J. S., to whom it had been negotiated: Held, that such payment did not constitute a good petitioning creditor's debt. Ex parte *Holding re Holding*, 1 G. & J. 97.

4. By deed of the 10th June 1780, made on the marriage of the bankrupt, his estate was limited to himself for life, remainder to his wife for life, remainder to T. G. for 500 years, in trust, in case the wife should die in the life-time of her husband without issue between them, to raise, by sale or mortgage, after the death of the husband, 300*l.*, and pay the same as the wife should by deed or will appoint. In June 1809 the bankrupt borrowed 500*l.*, and for securing the same he and his wife, after levying a fine, together with T. G., executed a mortgage of the estate; and the bankrupt gave T. G. his promissory

note for 200*l.*, payable on demand, as part of the sum of 300*l.* secured by the settlement: Held, that the promissory note was not a good petitioning creditor's debt. *Ex parte Page re Page*, 1 G & J. 100.

5. An act of parliament authorising the Norwich Fire Insurance Company to sue in the name of their secretary, does not warrant the suing out a commission of bankruptcy upon the petition of the secretary, as on a debt due to himself. *Guthrie v. Fiske*, 3 Starkie, 151.

6. Where in an action of trover, brought in C. P., to try the validity of a commission of bankruptcy issued against the plaintiff, by the defendant, as his assignee, the latter produced an office copy of a roll in the Court of K. B., in which it appeared that an action was commenced there against the plaintiff and his partner more than six years before, and continuances brought down to the term before the trial in C. P.: Held, that the petitioning creditor's debt, on which the commission was founded, was not barred by the statute of limitations; for, as long as a remedy is open by which the debt may be recovered anywhere, it does not fall within the operation of that statute. *Gregory v. Hurryll*, 6 Moore, 525.

7. Where *A.* having drawn a bill of exchange for 148*l.*, in favour of *B.*, to whom he was previously indebted in that amount, committed an act of bankruptcy before the bill either was due or had been presented for acceptance: Held, that such bill of exchange was a good petitioning creditor's debt; although it appeared, that subsequently to the commission the bill had been duly presented and paid by the acceptors. *Ex parte Douthat*, 4 Barn. & Ald. 67.

8. A debt for interest is not proveable under a commission of bank-

rupt on a bill of exchange, unless such interest be expressed in the body of the bill. Therefore where a bill of exchange was drawn by *A.* for 98*l.* 11*s.* payable to his order at three months after date, and endorsed to *B.* and on being dishonoured was duly protested, and the interest thereon afterwards amounted to 1*l.* 17*s.*: Held, that such interest could not be considered as part of a good petitioning creditor's debt, under a commission issued against *A.* *In re Burgess*, 2 Moore, 745.

9. A creditor of an insolvent trader may, after the debtor's discharge under the 53 G. 3. c. 102., take out a commission of bankruptcy against him, and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt at law to support the commission. *Jellis v. Mountford*, 4 Barn. & Ald. 256.

PLEADING.

1. A petition to supersede must contain an allegation that the petitioner is a creditor. *Ex parte Osley re Gribble*, 1 G. & J. 12.

2. Counts for money lent and for money paid by plaintiff as assignee of a bankrupt, were joined with counts for money had and received to plaintiff's use, and upon an account stated with him as assignee: Held, upon error after verdict, that these counts were well joined. *Richardson v. Griffin*, 5 Maul. & Selw. 294.

3. In assumpsit by the provisional assignee of a bankrupt, defendant pleaded the general issue: Held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees between the time of issuing the latitat

and the delivery of the declaration, is no ground of nonsuit, upon a plea of non-assumpsit. *Quære*, whether it would have been an answer to the action if specially pleaded? *Page v. Bauer*, 4 Barn. & Ald. 345.

4. *A.* and *B.* were partners: *A.* committed an act of bankruptcy, and afterwards, but before the bankruptcy of *B.*, the sheriff seized goods which had belonged to *A.* and *B.*, under an execution against them: Held, that the assignees of *A.* and *B.* under a joint commission could not, suing as such, recover *A.*'s share of the property therein. *Hogg v. Bridges*, 8 Taunt. 200.

5. *A.* and *B.*, assignees under one commission of bankrupt, and *C.*, assignee under two other commissions, cannot sue jointly: the declaration should state what their respective interests are. *Ray v. Davies*, 8 Taunt. 134.

6. Goods taken under an execution against *A.*, which had been in his possession more than two months before issuing a commission against him, may be considered as his property, under 49 G. 3. c. 121. s. 2., and may be described as such in a declaration of assumpsit by his assignees, on a guarantie given by the defendant to the bankrupt. *Sampson and others, assignees of Cook*, a bankrupt, *v. Burton and others*, 4 Moore, 515.

PRACTICE.

See AFFIDAVIT, 8. AMENDMENT, 1.
2. ASSIGNEES, 15. CERTIFICATE.
PROOF, 17. SUPERSEDEAS, 3.

1. A petition, which purported to be signed "in the presence of *Thomas Lee*, Master Extraordinary in Chancery," permitted to stand over for the purpose of amendment, and

an affidavit being filed to shew that *Lee* was, at the time of the signature, the petitioner's solicitor or agent; the petitioners paying the costs of the day. *Ex parte Rawlinson re Rawlinson*, 1 G. & J. 19.

2. Commission sealed but not opened, not supersedeable at the instance of the petitioning creditor, without notice to the bankrupt. *Anonymous*, 1 G. & J. 23.

3. Half of the dividends upon a proof of 500*l.*, in respect of a legacy to the wife of a bankrupt, ordered to be paid to her without a reference. *Ex parte Newham re Newham*, 1 G. & J. 40.

4. A commission supersedeable for want of prosecution under the general order of the 26th June 1793, cannot be superseded by the bankrupt without a petition. *Ex parte Gale re Gale*, 1 G. & J. 43.

5. Affidavit sworn before the clerk of the solicitor to the commission, not allowed to be read. *Ex parte Green re Harris*, G. & J. 16.

6. The Court will not order that service of a petition to stay a certificate at the bankrupt's residence should be good service, unless the application be made before the petition day; except in cases where an earlier application is prevented by the conduct of the bankrupt. *Ex parte Harrison re Gray*, 1 G. & J. 71.

7. Joint creditors may petition to prove against the separate estate, on account of a fraudulent abstraction of joint funds, without a previous application to the commissioners. *Ex parte Smith re Harding*, 1 G. & J. 74.

8. Though the commission be not opened, the petitioning creditor cannot proceed at law, if it be capable of prosecution. When a commission is not prosecuted so far as to give an interest in it to others, the petitioning

creditor may obtain a supersedeas as of course; unless the bankrupt oppose. Ex parte *Prowse* re *Prowse*, 1 G. & J. 92.

9. No costs given upon a petition by joint creditors to prove against the separate estate, there being no joint effects or solvent partner. Ex parte *Bradshaw* re *Aubrey*, 1 G. & J. 99.

10. No application to take a petition out of its turn can be heard, unless notice has been given of the intention to make such application. Re *Bell*, 1 G. & J. 182.

11. Filing affidavits in answer is a waiver of the objection to the affidavits in support of the petition, that they were filed before the petition was presented. Ex parte *Gilpin* re *Smith*, 1 G. & J. 188.

12. One of several assignees may sue out a commission, in respect of a debt due to their bankrupt, without the other assignees joining in the affidavit, &c. A commission issued on the petition of a solvent partner, who was one of the assignees of his bankrupt co-partner, in respect of a partnership debt: Held regular, though the other assignees did not join in the affidavit, &c. Ex parte *Blakey* re *Blakey*, 1 G. & J. 187.

13. When, under an order in bankruptcy, money is directed to be paid, the next order is to pay within four days, or stand committed. Ex parte *Davison* re *Harper*, 1 G. & J. 227.

14. The first regular docket in the office has the priority. Ex parte *Stocker* re *Collins*, 1 G. & J. 249.

15. Where a petition to stay a certificate is not served before the next petition day, the course is for the bankrupt to present a short petition, praying that his certificate may be allowed. Ex parte *Moore* re *Moore*, 1 G. & J. 253.

16. Admission by the bankrupt of

the receipt of the copy of a petition to stay his certificate, not a waiver of personal service. Ex parte *Furnival* re *Furnival*, 1 G. & J. 254.

17. The time for opening the commission enlarged, where the adjudication had been prevented by the witness to prove the act of bankruptcy secreting himself in concert with the bankrupt. In re *Hayes*, 1 G. & J. 255.

18. An order signed and passed cannot be corrected in respect of costs by a separate petition as to costs only: where the question is, not as to the personal payment of costs, but whether they are payable out of a particular fund, a petition for rehearing may be presented for the purpose of determining that question. Ex parte *Baines* re *Hobden*, 1 G. & J. 259.

19. Docket struck after the Vice-Chancellor had pronounced an order for the superseding of a commission against the same party, on the production of the necessary consents, but before the order was drawn up, or the consents produced, held regular. Ex parte *Bower* re *Pullan*, 1 G. & J. 262.

20. It is irregular in the assignees to obtain an ex parte order to enlarge the time for the last examination of a bankrupt, who is ready to attend. Ex parte *Dayris* re *Martelly and Dayris*, 1 G. & J. 281.

21. Petition by bankrupt and several creditors to supersede the commission before the bankrupt had surrendered, dismissed with costs against all, except the bankrupt. Ex parte *Wilkinson* re *Wilkinson*, 1 G. & J. 387.

22. Objection, that the solicitor attesting the petition, being at the time in prison, was within 22 Geo. 2. c. 18. s. 9. overruled. Ex parte *Thompson* re *Hedley*, 1 G. & J. 308.

23. Form of issue as to concert. Practice as to the direction, that parties should be examined on the trial of the issue. *Ex parte Carter re Sims*, 1 G. & J. 326.

24. If the person attesting the signature of the petitioner, under the general order of August 1809, is not the solicitor actually presenting the petition, he must state himself in his attestation to be the attorney, solicitor, or agent of the party signing in the matter of the petition. *Ex parte Wilkinson re Wilkinson*, 1 G. & J. 353.

25. Where a joint affidavit by two petitioning creditors upon striking the docket, the amount of one of the debts was incorrectly stated, it was ordered, that a supplemental affidavit should be made without new bonds. It is not necessary that the bond and affidavit should be of the same date. *Ex parte Maugham re Weller*, 1 G. & J. 365.

26. Application for the amendment of the commission and petition refused. *Ex parte Forshaw re Horrocks*, 1 G. & J. 368.

27. The proceedings in an action on the bail bond having been stayed; the defendant pleaded to the original action the general issue, and subsequently a plea of bankruptcy *puis d'arrein continuance*: there being no affidavit that the application to stay the proceedings was made on the part of the bail, the court now set aside the latter plea, and restrained the defendant to his plea of general issue, on the ground that when the proceedings were stayed in the action on the bail bond, it was intended that the defendant should only question the validity of the original debt. *Dowson v. Levi*, 4 Barn. & Ald. 249.

28. If a matter in bankruptcy is referred to a Master, and he finds it necessary to examine witnesses, a

certificate to the court must be made by him of the necessity of such examination, and the court will thereupon make an order accordingly. *Anonymous*, 4 Mad. 379.

29. Petition for leave to except to Master's report of costs. *Ex parte Leigh*, 4 Mad. 394.

30. Plaintiff becoming bankrupt, bill ordered to stand dismissed, unless supplemental bill filed by assignees within a fortnight. *Wheeler v. Malins*, 4 Mad. 171. *Porter v. Cox*, 5 Mad. 38.

31. On application to supersede a commission of bankruptcy and issue another, the act of bankruptcy being subsequent to the date of the commission, the solicitor was required to state by affidavit, why he took out a commission which he could not support. Pending that, the time having expired, another creditor obtained a supersedeas and a commission, under the apprehension of immediate extents. The bankruptcy was afterwards declared under the first commission, upon acts of bankruptcy found previous to its date, but the latter commission was preferred. *Ex parte Mavor*, 19 Ves. 539.

32. Application for a commission of bankruptcy on the evening of the fourth day from striking the docket immediately before eight o'clock, the hour of shutting the office, sufficient within the general order, 29th December 1806. *Nicholl's Case*, 19 Ves. 616.

33. Where a party was described in a commission of bankrupt, as a dealer in a particular trade, and the evidence of dealing was in a different trade, the Court allowed a new trial, on the ground of surprise. *Hale v. Small*, 8 Taun. 730.

PRINCIPAL AND SURETY.

See SURETY.

1. A bond was executed by an insurance broker as the principal obligor and two sureties, with a condition, that if they should pay the obligees certain premiums, which should become due for assurances on ships at sea, as should be made with the obligees by the insurance broker, and that within six months after making the assurances, the bond was to be void. The broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of six shillings in the pound under the commission. The premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy. Held, first, that the sureties were not discharged by the laches of the obligees, in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond; and, secondly, that the dividend received by them under the commission was to be deducted as against the sureties from the penalty contained in the bond. *London Assurance Company v. Buckle*, 4 Moore, 183.

2. Where a surety in a warrant of attorney, in order to discharge himself from the personal liability, paid part of the debt due to the creditor of a bankrupt who had proved under the commission, and thereupon satisfaction was entered on the record: Held, that this did not fall within 49 Geo. 3. c. 121. s. 8., as being payment of part of a debt in discharge of the whole, and that, consequently, the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. *Souther v. Souther*, 5 Barn. & Ald. 852.

3. The acceptor of an accommodation bill drawn by the defendants before bankruptcy, declared against them specially after their bankruptcy for not providing him with funds to pay the bill when due, whereby he had been forced to pay the costs of an action, and give a cognovit for the amount of the bill, and had been obliged to sell an estate in order to raise money for the payment of the same. The defendants pleaded their certificate. The Court of Common Pleas held this a good bar, under statute 49 Geo. 3. c. 121. s. 8., and the Court of King's Bench afterwards affirmed the verdict. *Vansandau v. Corsbie and Another*, 8 Taun. 550.

4. To assumpsit for money paid, the defendant pleaded his bankruptcy and certificate, and that the plaintiff, before the issuing of the commission, was surety for the defendant's debt, and that the money paid was paid by the plaintiff as his surety after the issuing of the commission, and before a final dividend. Replication that the plaintiff, before issuing the commission, was surety to J. for the defendant, that the defendant should perform articles of agreement by which an annual rent was to be paid by the defendant; that, after his bankruptcy, rent became due by the defendant, and that the money was paid by the plaintiff as the defendant's surety, by reason of the defendant's non-payment, and for the costs of an action by J. against the plaintiff as surety: Held on demurrer, that the plaintiff was not surety for, or liable to, a debt due at the time of issuing the commission, and that he was therefore not within the eighth section of the 49 Geo. 3. c. 121. *McDougall v. Paton*, 8 Taun. 584.

5. A guarantee on a bill who is discharged by bankruptcy from his liability on the bills is discharged.

also from the costs of an action against the principal. *Bottomley v. Wilson*, 3 Starkie, 148.

PROCEEDINGS.

1. Application by the petitioning creditor and provisional assignee, under a subsisting commission against H. and G., to compel the solicitors under a superseded commission against the same parties, to deliver up the proceedings under the superseded commission, refused. *Ex parte Shaw re Howard and Gibbs*, 1 G. & J. 124.

2. A bankrupt is entitled to an inspection of the proceedings, for the purpose of ascertaining the debts proved, with a view to his certificate. *Ex parte Morgan re Morgan*, 1 G. & J. 404.

PRODUCTION OF BOOKS.

Application to compel a creditor, taking benefit of the commission, to produce his books relating to his transactions with the bankrupts refused. *Ex parte Woolley re Dowman*, 1 G. & J. 395.

PROOF.

See CERTIFICATE, 9, 10.
ELECTION, EXECUTOR, 1, 2. INTEREST, 2. JOINT AND SEPARATE COMMISSION, 1. PRACTICE, 7.

1. Six persons are in partnership as bankers, under two firms, J. and W. J., two of them, carry on a distinct trade. G. accepts a bill for J. and W. J., and in exchange they deliver to him at the same time, a bill to the same amount, drawn and ac-

cepted by the six, but not indorsed by J. and W. J.: Held, it was a purchase by G., and that G. having paid his acceptance, and the bill he received being dishonoured, was not entitled to prove the amount against J. and W. J. *Ex parte Hustler re Goodchild*, 1 G. & J. 9.

2. The proof of a debt, though by 49 Geo. 3. c. 121. s. 14. a conclusive election to adopt the commission, does not affect the remedies of the parties proving for the recovery of his debt unpaid, in cases within 5 Geo. 2. c. 30. s. 9. *Ex parte Buckle re Gibson*, 1 G. & J. 32.

3. Creditors who had obtained an order to prove under a second commission, in which fifteen shillings in the pound was not paid: Held to be entitled to prove their debts unpaid under a third commission. *Ex parte Buckle re Gibson*, 1 G. & J. 32.

4. A creditor holding a bill of exchange with the bankrupt's name upon it, proves a debt, upon a deposition, stating that he holds the bill as security; and subsequently receives 15s. in the pound upon the bill from the other parties, and 5s. in the pound upon the proof; restrained from receiving further dividends on the amount of the bill. *Ex parte Rufford re Wood*, 1 G. & J. 41.

5. A creditor having shortly before the commission, seized the effects of the bankrupt in execution, and having after the commission satisfied part of his debt by sale of the effects, admitted to prove the residue. *Ex parte Hopley re Illingworth*, 1 G. & J. 63.

6. Where one partner is entrusted with the entire management of the partnership business, and openly, without disguise or concealment, enters in the partnership books the money withdrawn by him from the

joint stock for his separate use, it is not a fraud which will entitle the joint creditors to prove against the separate estate of that partner. *Ex parte Smith re Harding*, 1 G. & J. 74.

7. One of three partners assigns his interest in the partnership property to the two continuing partners, who covenant to pay the debts of the three, and afterwards become bankrupt: Held, that joint creditors of the three were not entitled to prove against the estate of the two. *Ex parte Fry re Aspinall*, 1 G. & J. 96.

8. If a debtor to a bankrupt's estate acquire a bill with the bankrupt's name upon it, which he knows forms no demand upon the bankrupt's estate, after notice of the bankrupt's insolvency, and with a view to set off, he is not a *bonâ fide* holder. *Ex parte Stone re Welton*, 1 G. & J. 191.

9. By settlement previous to the marriage of the bankrupt, 6000*l.* stock (\$000*l.* of which was the fortune of the wife) was assigned to trustees in trust, to pay the dividends thereof to the bankrupt for life, or until he should become bankrupt; and from and after his decease, or from the time of his becoming bankrupt, if the wife should be then alive, to pay the same to her for her support, and on her receipt notwithstanding her coverture; the same, after the death of the bankrupt, to be in the nature of her jointure, and in bar of dower; and the trustees were thereby directed to stand possessed of a bond for 2000*l.* (given by the bankrupt to the trustees) in trust, if there should be no issue of the marriage, or being such, all should die in the lifetime of the bankrupt as therein mentioned, after the death of the bankrupt, if the wife

should survive, to raise the sum of 2000*l.*, and pay the interest thereof to the wife for life, by way of increase to the provision thereinbefore made for her in the nature of jointure, in the events thereinbefore mentioned; and in case of issue of the marriage living at the death of the bankrupt, the bond to be delivered up and cancelled: Held, (the wife living, and no issue,) that the bond was not proveable. *Ex parte Taaffe re Macdonnell*, 1 G. & J. 110.

10. Bequest of stock to A. and B., in trust to pay the dividends to testator's brother for life, and after his death to testator's sister, and upon the death of the survivor to A. absolutely. A., the surviving trustee, sold out the stock, applied the proceeds to his own use, and became bankrupt. Upon a petition by testator's sister and husband, to prove the value of the stock sold, it was ordered, that the commissioners should compute the value of the stock so bequeathed at the commission, and that the husband should be at liberty to prove the amount of such value, the dividends to be paid into the bank, subject to the further order of the Court. *Ex parte Fairchild re Andrews*, 1 G. & J. 221.

11. Petitioner being a creditor of the bankrupt on a cash balance, and being under acceptances for the bankrupt's accommodation, which were not paid at the bankruptcy, and having received from the bankrupt bills of exchange and a promissory note to a larger amount than the cash balance, which were negotiated by the petitioner; not allowed to prove the cash balance, on the principle of excluding the dishonoured paper on both sides, or otherwise. *Ex parte Read re Lynn*, 1 G. & J. 224.

12. A party tendering the proof

or claim of a debt under a commission is entitled to the judgment of the commissioners upon his right to prove or claim before he discharges the bankrupt or relinquishes his action; but the bankrupt must be discharged, and the action and all benefit from it relinquished, before the proof or claim is admitted upon the proceedings. *Ex parte Frith re Spear*, 1 G. & J. 165.

13. Bequest to J. B. and J. T., in trust for the wife of J. B. for life, and after her death for the children of the wife of J. B., in such shares as J. B. and his wife or the survivor should appoint, and in default of appointment for all the children equally, to be divided at twenty-one; there were five children of J. B. and his wife, and no appointment was made. J. B. sold out and advanced part of the trust funds to J. B. the younger, and G. F. B., two of the children; and J. B., J. B. the younger, and G. F. B. became bankrupt: Held, that W. B., one of the five children who had each a vested interest in one-fifth part of the trust funds after the death of their mother, subject to the power of appointment, was entitled to prove one-fifth part of the trust funds so misapplied against the estate of J. B., the dividends to be paid into the bank subject to the further order of the Court. *Ex parte Beilby re Boyes*. *Ex parte Hall re Boyes*, 1 G. & J. 167.

14. Surety in a bond for the bankrupts, after the bankrupts obtain their certificate, joins with them in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety: Held, that this was not equivalent to payment by the surety, so as to enable him to prove under the commission. *Ex parte Serjeant re Parkinson*, 1 G. & J. 183.

15. Application by a creditor holding property of the bankrupt, the title to retain which was disputed, to take it at a fixed value, and to prove for the difference, and to vote in the choice of assignees. *Ex parte Barclay*, and *ex parte Knight re Brunder and Barclay*, 1 G. & J. 272.

16. *H. W.* assigned to *R. S.* 600*l.*, in trust to invest, to pay the interest or dividends thereof to *H. W.* for life, and after her death, in trust, that *R. S.* should pay all interest or dividend, except of the principal sum of 100*l.*, part of the 600*l.* (which it was declared *R. S.* might deduct for his care and pains during one year next after the death of *H. W.*) for the benefit of the children which *H. W.* might leave; and if *H. W.* should die without issue, then in trust, as to the remaining stock, and the dividends or interest due thereon, unto *A. W.* and *M. W.*, the sisters of *H. W.*, or their children, in case of the death of either of them, in equal proportions, and *H. W.* thereby agreed, that *R. S.* should retain out of the trust monies all costs and charges in respect of his trust, and the clear yearly sum of 20*l.* for his care and trouble, and also the said sum of 100*l.*, for one year's allowance, for such care and trouble which he should have from the death of *H. W.*, and then the said annual sum of 20*l.*, from the end of such year, until the trusts should be completed. *R. S.* applied the 600*l.* to his own use, paying the interest to *H. W.* during his life. *H. W.* died in July 1819, and in January 1822 *R. S.* became bankrupt. Upon a petition by the parties entitled upon the death of *H. W.*, held, that the proof should be for the 500*l.* only. *Ex parte Kettlewell re Smith*, 1 G. & J. 321.

17. The proof of a debt which

must at all events be due, is not to be rejected because there is a question to be tried between the bankrupt's estate and the creditor, although it is proper that no dividend should be paid on that proof until the question be determined. Ex parte *Ackroyd* re *Pullan*, 1 G. & J. 398.

18. Where two partners of a large banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of monies procured for the aggregate firm, on the credit of the indorsement of the separate firm, the Lord Chancellor held, that no proof could be made on behalf of the firm of the two against the aggregate firm in respect of that debt. Ex parte *Sillitoe*, and Ex parte *Hunter*, in the matter of *Goodchild*, 1 G. & J. 374.

19. Where one or more partners of a larger firm carry on a separate trade, proof is admissible on behalf of the separate trade against the aggregate firm only, in respect of dealings between trade and trade. Ex parte *Sillitoe* and ex parte *Hunter* re *Goodchild*, 1 G. & J. 374.

20. 1st, In an action by original, if the Defendant does not appear, the bail-bond is forfeited on the *quarto die post*, the other four days being allowed merely *ex gratia*; and therefore, where a commission of bankruptcy issued against one of the bail to the sheriff after the *quarto die post*, but within four days, it was held, that the penalty of the bond was a debt proveable under the commission, and therefore barred by the certificate. *Coulson v. Hammon*, 2 Barn. & Cres. 626.

21. Application by a creditor, who held in his hands goods of the bankrupt taken in execution shortly before the commission issued, to be al-

lowed to prove the difference between his debt and the value of the goods refused. Ex parte *Hopley*, 1 Jac. & Walk. 423.

22. On a separate commission against one of a firm, a joint and separate creditor, who in respect of his joint debt had taken a warrant of attorney, and sued out a separate execution against the bankrupt: Held entitled to prove his separate debt, without giving up his execution. Ex parte *Stanborough*, 5 Mad. 89.

23. An assessment for church and highway rates is a debt, and the assessor a creditor under the bankrupt laws. *Lloyd v. Heathcote*, 2 Brod. & Bing. 388.

24. Where *R.* and *J.* gave mutual acceptances, which were reindorsed to *C.*, who, under an agreement with the bank, paid them in, in part satisfaction of a loan, the bank subsequently renewed the bills; but before they became due, *J.* suspending payments, the bank, according to the terms of the agreement, required a substituted acceptance, which *R.* procured from *J.*, and the same was indorsed to the bank. *J.* becoming bankrupt, *R.* proved in respect of his acceptance, and received 18s. in the pound. On petition, the proof of *R.* ordered to be expunged, the dividends refunded, and the bill delivered up. Ex parte *Hunter* re *Goodchild*, 5 Mad. 165.

25. On petition to expunge proof, founded on affidavit of creditor, who died before proof made, commissioners ordered to review the proof, though two dividends had been made. Ex parte *Bridges*, 4 Mad. 269.

26. A creditor having paid himself part of his debt by the sale of goods taken under an execution, the validity of which was disputed, admitted, (after the choice of assignees)

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to prove for the difference. *Ex parte Hopley*, in the matter of *Illingworth*, 2 Jac. & Walk. 220.

27. If managing partner draws out monies and conceals the fact, or disguises it in the partnership books, this is fraud, and proof may be made against the separate estate; otherwise if the transaction is duly entered in books. *Smith* in re *Hay*, 6 Mad. 2.

28. A commission of bankrupt was sued out against the Plaintiff in April, and superseded the 2d of August. A second commission was sued on the 7th of August, on the same act of bankruptcy under which Plaintiff obtained his certificate. Plaintiff sued the Defendant's commissioners under the first commission for an alleged wrongful imprisonment; they entered up judgment of nonsuit against him in July, and afterwards charged him in execution in costs: Held, that the Defendants might have proved their debt under the second commission, and that Plaintiff was entitled to be discharged from it under his certificate. *Holding v. Impey* and others, 1 Bing. 189.

PROTECTION FROM ARREST.

See COMMISSIONERS, 8.

1. When the last examination is adjourned, *sine die*, the bankrupt is not protected from arrest. *Ex parte Woods* re *Woods*, 1 G. & J. 75.

2. A bankrupt having surrendered has his protection from arrest by the statute, independently of the commissioners' certificate. *Ex parte Leigh* re *Leigh*, 1 G. & J. 264.

3. Bankrupt at large on bail, not in custody within the meaning of the

REAL ESTATE.

exception in 5 Geo. 2. c. 30. s. 5. *Ibid.*

PROVISIONAL ASSIGNEE.

See INFANT TRUSTEE.

R

RECEIVER.

1. Trustee and executer becoming bankrupt, receiver appointed. *Langley v. Hawke*, 5 Mad. 46.

2. Solvent partner appointed receiver, without salary, of the partnership property. *Ex parte Stoveld* re *Upperton*, 1 G. & J. 303.

REAL ESTATE.

1. *Scott, Nicholson, and Smith* carried on business as bankers, in partnership, and were interested in the profits and losses of such banking concerns respectively, as follows: *Scott*, for five-twelfths, *Nicholson*, for two-twelfths, and *Smith* for five-twelfths parts. On the 20th of January 1812, a commission of bankruptcy was awarded against them, but the full amount of the joint and separate debts of the bankrupts, with interest, was paid. To complete such payment, real estates of great value, belonging to the bankrupt *Scott*, were sold by the assignees, and on the whole the said bankrupt contributed upwards of 46,000*l.* beyond his proportionate share of the losses of the firm. Part of the said estates

were sold during the life of the bankrupt *Scott*; part were contracted to be sold, but not sold at the time of his death; and the remainder were sold since his death, and a surplus remained in the hands of the assignees: Held, that the heir of *Scott*, as such, had no claim in respect of the estates of the bankrupt *Scott*, sold in his lifetime, the same being converted out and out, and the produce must be taken as it is found, but that the surplus monies in the hands of the Plaintiff to the amount of the produce of the estate sold after the death of *Scott*, the bankrupt, belonged to the heir at law, with 4 per cent. interest, unless rents and profits were claimed. *Banks and others v. Scott and others*, 5 Mad. 493.

RELATION TO THE ACT OF BANKRUPTCY.

1. *A.* being indebted to *B. & Co.*, who became bankrupts, deposited a promissory note with the Defendants, as their assignees, and afterwards paid them the amount of the debt due from him to *B. and Co.*, on which the note was given up; the commission against them was superseded and another issued, under which the Defendants were re-appointed assignees. Four months after *A.* had made the payment to them, he became bankrupt, on a secret act of bankruptcy previously committed by him: Held, in an action for money had and received, brought by his assignees against the Defendants in their own right, between the superseding the first commission and issuing the second; that they were not entitled to recover the payment made to the latter, by *A.* being protected by the 46 Geo. 3. c. 135. s. 1., as the

subsequent commission revested those rights in the Defendants which they believed to exist when the payment was made, and as such payment, if made to *B. and Co.* could not have been disturbed if they had remained solvent. *Davenport and others v. Carter and others*, 5 Moore, 16.

2. Goods of the bankrupt having been delivered to a purchaser on the day on which the bankrupt went to prison, and paid for the next day, the payment will be defeated by the relation of the act of bankruptcy, by lying in prison for two months to the day of the arrest. *Saunderson v. Gregg*, 3 Starkie, 72.

REPUTED OWNER.

See ORDER AND DISPOSITION.

S.

SEQUESTRATION.

1. Where there was a debt due for money had and received, and the same was secured by a promissory note on an improper stamp, the debt was held sufficient to support a sequestration in Scotland. *Ex parte Geldes re Mount*, 1 G. & J. 414.

2. Where a petition for a sequestration against a party domiciled in Scotland was on the 25th of January, and the first deliverance upon that petition on the 26th of January, and the sequestration awarded by interlocutor of the 16th of August, and a commission of bankruptcy issued on the 15th of March upon an act of bankruptcy committed on the 4th of January: Held, that the

sequestration had the priority. 1 G. & J. 414.

SET OFF.

See MUTUAL DEBTS.

1. Executors allowed to set off a moiety of a legacy given by their testator to the wife of the bankrupt against a debt due from the bankrupt to their testator. Ex parte *O'Ferrall re Gordon*, 1 G. & J. 347.

2. Legacy to the wife of a bankrupt who was largely indebted to testatrix. After the bankruptcy the wife dies: executors of testatrix held entitled to retain the legacy in part discharge of the debt. *Ranking v. Barnard*, 5 Mad. 32.

3. A broker adjusts a loss with the underwriter, and his name is struck out of the policy and adjustment; the broker becoming bankrupt within the month, the underwriter cannot set off against the assured the balance due to him from the broker at the time of adjusting the policy: even (semble) although that balance should exceed the amount of the loss. *Todd and others v. Reed*, 3 Starkie, 16.

4. An underwriter in an action by the assignees of a bankrupt, assured upon a loss which happened after the bankruptcy, may set off a sum due to him for premiums on the balance of accounts between the bankrupt and himself. *Graham and others, assignees of Leigh a bankrupt, v. Russell*, 5 Maul & Selw. 498.

SHIP REGISTRY ACTS.

SETTLEMENT.

See *BARON AND FEME. SETT OFF. PROOF*, 9. 16.

Voluntary settlement by a bankrupt, though void against his creditors, subsists for all other purposes. Ex parte *Bell re Webb*, 1 G. & J. 282.

SHIP REGISTRY ACTS.

See *ORDER AND DISPOSITION*, 1.

1. Under a commission of bankruptcy against two partners, ships registered in the name of one of them, but in the ordering and disposition of both form part of the joint estate. Ex parte *Burn*, 1 Jac. & Walk. 378.

2. A. B., being sole owner of a ship by indenture of the 24th of June 1819, assigned three-fourth shares of it to a creditor, as security for a debt. The deed contained clauses by which the creditor was to reconvey the three-fourth shares upon payment of his debt, and a power of sale to the creditor, in case the debt was not paid within a given time. A. B. was to be permitted to freight the ship, and to load cargoes from time to time, &c., and was to insure the ship for the amount of the debt in the name of the creditor, or otherwise to assign the policies to him. At the time of the execution of the deed, the ship was absent from her port of registry on a voyage to North America, but all the forms prescribed by the ship registry acts as to the transfer, were duly complied with. The ship returned to her port of registry in July 1819, and was constantly employed from that time till February 1822 by A. B. in carrying

cargoes for his own use, and on his sole account; and he continued during all that time in the actual possession of the ship, and to manage and navigate her without the interference or control of the creditor. A. B. having become bankrupt, it was held that, as he had once been the real owner of the whole ship, and had never done any thing to make it notorious to the world that he had ceased to be the owner of the three-fourth shares, he continued to be the apparent owner of those shares with the consent of the true owner, down to the time of the act of bankruptcy, and therefore that those shares passed to his assignees as property in his order and disposition within the meaning of the 21 Jac. 1. c. 19. *Kirkley*, assignee of *Thompson*, v. *Hodgson*, 1 Barn. & Cress. 588.

SOLICITOR.

See CERTIFICATE. PETITIONING CREDITOR'S DEBT, 2. PROCEEDINGS, 1. PRACTICE; 1. 22. 31.

1. Application to remove a solicitor from being or acting as a master extraordinary of the Court of Chancery, and to strike him off the roll of such court, though it may be properly made by reason of his conduct in matter of bankruptcy, should not be made in the bankruptcy, but should be addressed to the general jurisdiction of the court. Ex parte *Lowe* re *Amyes*, 1 G. & J. 78.

2. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for costs of an action brought against the bankrupt subsequently to the issuing of the commission, to

recover the amount of his bill. *Lambert v. Buckmaster*, 2 Barn. & Cress. 616.

SOLICITOR'S BILL OF COSTS.

1. Application by the solicitor for payment by the assignees, having assets, of his bill of costs up to the choice as taxed by the commissioners. Ex parte *Haynes* re *Ring*, 1 G. & J. 35.

2. A creditor cannot apply to have the solicitor's bill taxed, except on the ground of neglect of duty by the assignees. Ex parte *Walker* re *Sykes*, 1 G. & J. 95.

3. Order in bankruptcy referring a solicitor's bill to a master for taxation, reserving costs of taxation; bill taxed and more than one-sixth taken off. The solicitor brings an action for the taxed costs, without deducting the costs of taxation. On petition the action was stayed, and a reference made to the master to tax the costs of the taxation of costs, and after deducting the amount thereof from the taxed costs, the same were ordered to be paid to the solicitor. Ex parte *Bellott* re *Lingard*, 4 Mad. 379.

4. It is not of course to refer to the master a bill of costs up to the choice of assignees already taxed by the commissioners: particular objections must be stated. If the solicitor refuses to give a copy of his bill, a reference will be made. Ex parte *Sutton* re *Brereton*, 4 Mad. 395.

5. A petition for an order to tax a solicitor's bill of costs up to the choice of assignees after it has been taxed by the commissioners will not be granted unless specific errors are stated. Ex parte *Brereton* re *Sutton*, 4 Mad. 479.

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STATUTE OF LIMITATIONS.

See PETITIONING CREDITOR'S
DEBT, 6.

STOPPAGE IN TRANSITU.

1. A trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent soon after their arrival in London. The goods so consigned to him remained in the waggon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. A consignment of goods for the trader was delivered to the defendants on the 9th and 12th of August; on the 14th and 17th the goods arrived at the waggon office of the defendants. On the 16th or 17th the trader became bankrupt; and on the 19th notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order on the 21st, delivered the goods to a third house: Held, that the assignees of the bankrupt were entitled to recover the goods deposited with the defendants, and that the right of the consignor to stoppage in transitu, ceased on the arrival of the goods at the waggon office of the defendants in London. *Roze v. Pickford*, 8 Taun. 83.

2. The unpaid vendor may stop in transitu before the goods come to the hands of the vendee's factor, although the factor has the bill of lading indorsed to order in his hands, and is under acceptance to the vendee on a general account. Therefore in such case, where the vendee became bankrupt, and the factor also became bankrupt, and the messenger under the factor's commission, upon the arrival of the ship went on board

SUIT.

and seized the cargo, the agent of the vendor having previously given notice to the captain to deliver the cargo to him, and the captain having agreed thereto: Held, that trover would lie by the vendor against the assignee of the bankrupt and factor. *Patten and others against Thompson*, 5 Maule & Selw. 550.

3. A. delivered a quantity of iron to a carrier to be conveyed by the latter to B., the vendee in the country. The carrier having reached B.'s premises, landed a part of the iron on his wharf, and then finding that B. had stopped payment, re-loaded the same on board his barge, and took the whole of his iron to his own premises: Held, that there was no delivery of any part of the iron so as to divest the consignor of his right to stop in transitu the special property remaining in the carrier, until the freight for the whole cargo was either tendered or paid, or until he had done some act shewing that he assented to part with the possession of the goods without receiving his freight. *Crawshaw v. Eames*, 1 Barn. & Cres. 181.

SUIT.

See JURISDICTION.

1. Mortgage of a copyhold. The mortgagor became bankrupt, but no bargain and sale was made to his assignee. The mortgagee files a bill against the bankrupt and his assignee to redeem. The bankrupt demurs, and his demurrer is allowed, he not being a necessary party to the bill. *Lloyd v. Lander*, 5 Mad. 282.

2. Bill filed against bankrupts and their assignees, questioning the validity of the commission, and praying an account, or if the commission was

legal, for leave to prove what should appear to be due under the bankruptcy; on a general demurrer by the bankrupt for want of equity, the same was allowed; the proper mode of questioning the validity of a commission being by petition. *Bailey v. Vincent*, 5 Mad. 48.

SUPERSEDEAS.

See ASSIGNEES, 5. COMMISSION. PETITIONING CREDITOR, 2. PLEADING, 1. PRACTICE, 2. 4. 21. 31.

1. It is an invariable rule that a commission taken out at the instance of the bankrupt will be superseded, however hostilely it may be prosecuted. Ex parte *Grant re Park*, 4 G. & J. 17.

2. Where a commission is taken out in violation of good faith, &c., application may be made to the Court to supersede it, notwithstanding that it is supersedeable at the bankrupt office for want of prosecution. Ex parte *Lowe re Amyes*, 1 G. & J. 78.

3. Commission superseded, upon an ex parte application, on the ground that two of the commissioners were creditors of the bankrupt. Ex parte *Mathews re Bingham*, 1 G. & J. 164.

4. Where the act of bankruptcy on the proceedings was a conveyance of the bankrupt's estate and effects, which upon the evidence appeared not to be drawn according to the intention of the bankrupt, commission superseded. Ex parte *Norris re Norris*, 1 G. & J. 233.

5. Where there was a separate commission against one of three partners, and afterwards a commission against two of the firm, first commission ordered to be superseded, and the

costs paid out of the joint estate. Ex parte *Smith re Martelly*, 1 G. & J. 256.

6. Though a commission be taken out for an undue purpose, yet, if that purpose can be defeated without superseding the commission, the Court will not interfere: otherwise, if the fraudulent object can only be prevented by superseding the commission. Ex parte *Bourne re Bourne*, 1 G. & J. 311.

7. Commission superseded after a delay of nine months, though the delay was occasioned by the acts of the bankrupt, and was with the concurrence of the creditors. Ex parte *Luke re Evans*, 1 G. & J.

8. Affidavits filed in support of a petition to supersede a commission and stay a certificate, need not be answered if founded only on information and belief; unless it is stated in the affidavit from whom the information was received, and that such person refuses to make an affidavit. Ex parte *Stevens re Aubert*, 4 Mad. 26.

9. When a petition is to supersede a commission for collusion, and stay a certificate, and there are suspicious circumstances, costs will not be given, though the petition fails. Ex parte *Stevens re Aubert*, 4 Mad. 266.

10. Bankrupt may petition to supersede his commission, on the ground that he was no trader, though he has obtained his certificate under it, if, upon an action by the assignees against a creditor, their title is successfully resisted, and the commission becomes inoperative. Ex parte *Bass*, 4 Mad. 270.

11. Commission cannot be superseded with the consent of the petitioning creditor, before the first meeting for the proof of debts. Ex parte *Law*, 4 Mad. 273.

12. Commission procured by bank-

rupt but proceeding fairly, not superseded. *Ex parte Warwick*, 4 Mad. 262. but see *Ex parte Grant*, *supra*.

SURETY.

See PROOF, 14.

1. Surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, having obtained his certificate, for the arrears of the annuity subsequent to the commission. *Watkins v. Flannagan*, 1 G. & J. 199.

2. Surety paying the debt after proof by the creditor under the commission, is entitled to stand in the place of the creditor for the debt paid, not only in respect of dividends, but of the certificate. *Ex parte Gee re Gee*, 1 G. & J. 330.

3. The acceptor of an accommodation bill brought an action of assumpsit against the drawers, who had become bankrupts, for not providing him with funds to pay the bill when due, according to a promise made by them so to do, in which action he declared that he had incurred the costs of an action brought against him by the holder of the bill, and was obliged to give a cognovit for its amount, and to sell an estate in order to procure the means of paying the money due on the bill: Held, that the plaintiff was a surety within the 49 Geo. 3. c. 121. s. 8. and should have proved his debt under the commission, and that the certificate, pleaded by the defendants, was a good bar to such action. *Vansandau v. Crosbie*, 2 Moore, 602.

4. To a declaration for money

paid, the defendant pleaded his bankruptcy and certificate, and that the plaintiff before the issuing the commission was a surety for a debt of the defendant, and that the money paid by the plaintiff for his use, was paid by him as such surety, after the issuing the commission, and before a final dividend had been made of the defendant's effects under the same, whereby the plaintiff became entitled to prove under the commission. Replication, that the plaintiff, before the issuing the commission, was surety to one J. J. for the defendant, that he the defendant should perform certain things contained in articles of agreement, by which an annual rent was to be paid by the defendant, and that after his bankruptcy three years' rent became due from the defendant, and that the money paid by the plaintiff for the defendant was paid by him as such surety, by reason of the nonpayment by the defendant of the rent, and for the costs of an action brought against the plaintiff as such surety by J. J.: Held, that the plaintiff was entitled to recover, as he could not be deemed liable as a surety within the statute of 49 Geo. 3. c. 121. s. 8. as that section relates only to debts of the bankrupt due at the time of issuing the commission. *M'Dougal v. Paton*, 2 Moore, 644.

5. A., B. and C. entered into a bond to the king, the condition of which was, that A. as sub-distributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum, and also the price of such vellum, together with all monies which he should receive on account of the duties on personal legacies and stage-coaches. A. as sub-distributor becomes in-

debted to the king in a certain sum, and afterwards becomes bankrupt and obtains his certificate. A *scire facias* having afterwards issued on the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that B. was a person "surety for or liable for a debt" of the bankrupt within the meaning of the 49 Geo. 3. c. 121. s. 8., and consequently that the latter was protected by his certificate. *Westcott v. Hedges*, 5 Barn. & Ald. 12.

6. Bail above are not sureties or persons liable within 49 Geo. 3. c. 121. s. 8. *Newington v. Keecys*, 4 Barn. & Ald. 493.

SURRENDER.

See PROTECTION, 2.

1. Bankrupt permitted to surrender, where his omission to surrender arose from apprehension of a prosecution. Ex parte *Berryman* re *Berryman*, 1 G. & J. 223.

2. Bankrupt obtaining leave to surrender after the time for surrendering is expired, pays the costs. Ex parte *Carter*, 4 Mad. 394.

T.

TAXATION.

See SOLICITOR'S BILL OF COSTS,
PETITIONING CREDITOR'S BILL.
VOL. I.

TITLE DEEDS.

See EQUITABLE MORTGAGE.

TRADING.

1. A person living in the Isle of Man, coming from time to time to England and buying goods, which are afterwards sold in the Isle, is a trader against whom a commission of bankruptcy may issue in England, although he, in fact, never sold any goods in England. *Allen v. Cannon*, 4 Barn. & Ald. 418.

2. Whether an insurance broker can be made a bankrupt. Ex parte *Stevens* re *Aubert*, 4 Mad. 256.

3. A pawnbroker is a broker within the 5 Geo. 2. c. 30. s. 39., and therefore subject to the bankrupt laws.

A person who had formerly taken in goods on pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to the bankrupt laws. *Rawlinson v. Pearson*, 5 Barn. & Ald. 124.

4. A jury having found that a keeper of hounds, who bought dead horses for his dogs, and then sold the skins and bones for a profit, was not thereby a trader, the Court refused to grant a new trial, or to disturb the verdict. *Summersett v. Jarvis and Others*, 3 Brod. & Bing. 2.

5. A smuggler may be a trader within 1 Jac. c. 15. s. 2. as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. *Cobb, Assignee of Monsey*, v. *Symonds*, 5 Barn. & Ald. 516.

6. A person who purchased dead horses for his dogs, and sells the skins and bones does not thereby become a

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trader, although he might sell such skins at a profit. *Summersett v. Jarvis and Another*, 6 Moore, 56.

7. A party engaged in the Greenland whale fishery purchases oil in three instances; it is for the jury to decide, whether these dealings constituted him a trader within the meaning of the statute. A declaration by the party of his object in buying oil is admissible evidence, to prove his intention. *Gale v. Halfknight*, 3 Starkie, 56.

TRUSTEE.

See PROOF, 9, 10. 13. 16. WIFE, 2, 3.

V.

VENDOR.

See LIEN.

VOLUNTARY PAYMENTS.

A voluntary payment to a creditor, under circumstances which might reasonably lead the debtor to believe bankruptcy probable (not inevitable), is a fraud upon the other creditors, and the money so paid may be recovered by the assignees after the bankruptcy has taken place as money had and received. *Poland v. Glyn*, 2 D. & R. (K. B.) 310.

WIFE, PROVISION TO,

VOLUNTARY SETTLEMENT.

See SETTLEMENT.

W.

WARRANT.

See COMMITMENT.

WIFE, EQUITABLE PROVISION TO,

See PRACTICE.

1. The equity of a wife to a provision out of her property attaches, for the benefit of herself and her children, on the filing of the bill which gives the court jurisdiction as to that property; whether the bill is filed by the wife or others: but she may waive it, even after a decree for a settlement, before its execution. The children held to be entitled to the benefit of that equity attaching upon bill filed by an executor, though the wife died before answer. *Steinmetz v. Halthin*, 1 G. & J. 64.

2. Residue given to the husband and A. B. in trust, amongst the other purposes of the will, as to a moiety for the wife for life; not intended a gift to her separate use, but subject to the absolute disposition of the husband. Husband having made a partial disposition of it by loan, held the dividends coming from the estate of the borrowers, were subject to the wife's equity. *Ex parte Beilby re Boyes*. *Ex parte Hall re Boyes*, 1 G. & J. 167.

3. Whether the gift of a particular

fund to the husband in trust for the wife for life, is to be intended as a gift to her separate use, — *quære*. *Ibid*.

WITNESS.

See EXAMINATION, EVIDENCE.

1. The petitioning creditor to a separate commission against A. will not be compelled to attend, in order to give evidence in support of a subsequent joint commission against the same party and his copartner. *Ex parte Stones re Barke and Langtry*, 1 G. & J. 7.

2. The partner of the bankrupt ordered to attend before the commissioners to be examined, and to produce the partnership books and papers, there being no suggestion of his being indebted to the bankrupt, or having property of the bankrupt in his possession. *Ex parte Levett re Senior*, 1 G. & J. 185.

3. In trover by the assignees of a bankrupt, for goods alleged to have been placed in the hands of the defendants for sale by the bankrupt, before his bankruptcy and on his account, and the defendants, in order to prove that the goods had been pledged by the bankrupt to C. and Co. for the repayment of money advanced to him thereon, and that the defendants had been legally responsible to them for money to be produced by the sale.—*Quære*, Whether a partner in the house of C. and Co. be admissible as a witness for the defendants, to shew under what circumstances the advances were made by that house to the bankrupt. *Butts and Others, Assignees of Fossett, Cooper, and Howard, v. Swann*,

Chappell, and Heywood, 4 Moore, 484.

4. The objection to a creditor as a competent witness to sustain a commission of bankruptcy cannot be taken by himself to preclude his examination. *Ex parte Chamberlaine*, 19 Ves. 481.

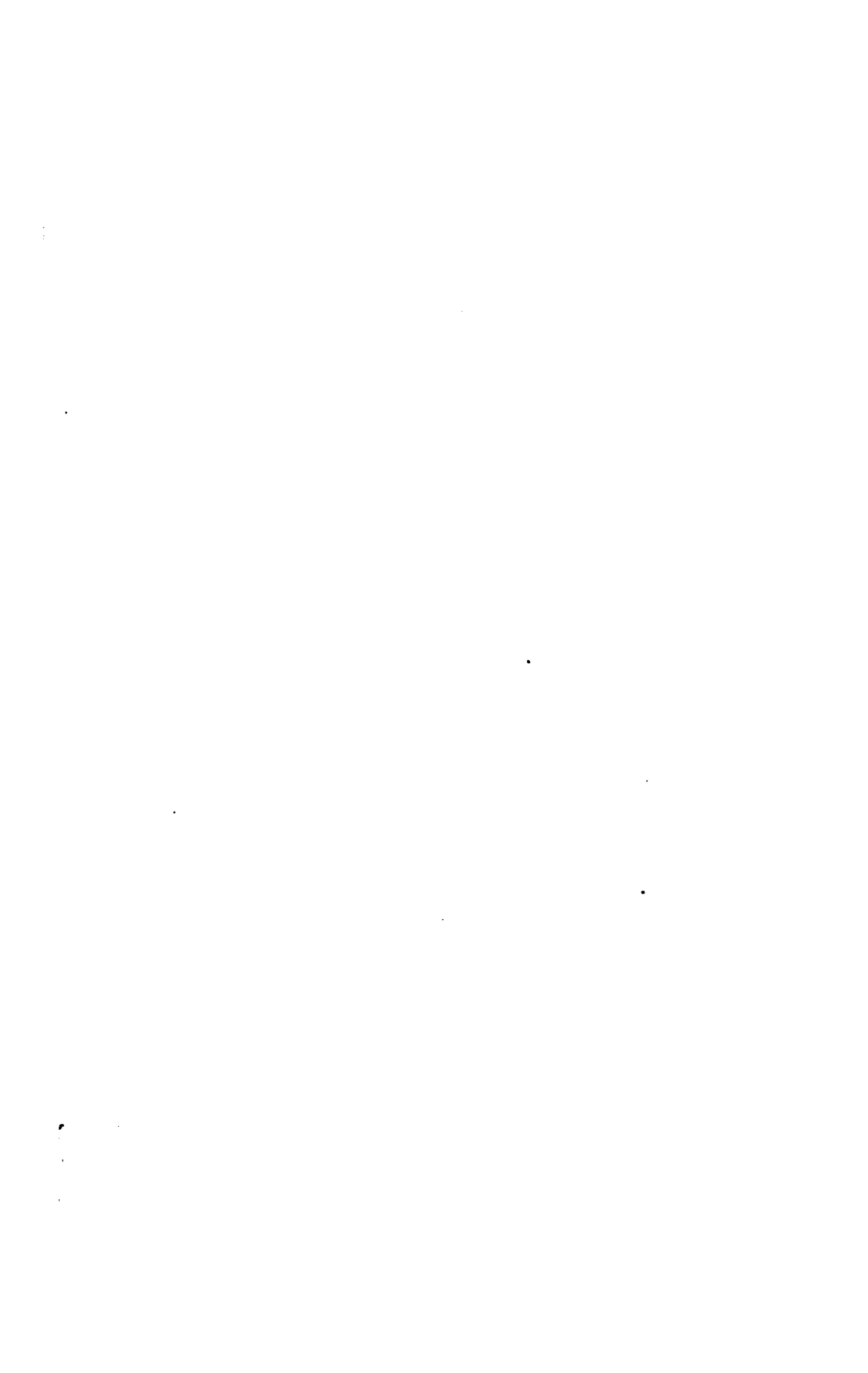
5. An assignee of a bankrupt having released his claim as a creditor on the bankrupt's estate is a competent witness to support the petitioning creditor's debt, as he merely stands in the situation of trustee to such estate. *Tomlinson v. Wilkes*, 5 Moore, 172.

6. In an action on the 9 Anne, c. 114., brought by the assignee of a bankrupt, to recover money lost by the bankrupt at play; the bankrupt, who had obtained his certificate, was called as a witness to prove the loss: Held, that he was incompetent, but that his incompetency was restored by three releases; first, by the bankrupt to the assignee; second, by all the creditors to the bankrupt; third, by the assignee (who was not a creditor) to the bankrupt: Held, secondly, that a year after the commission issued it might be presumed that all the creditors had proved, and that a release by all who had proved might therefore be considered as a release by all the creditors: thirdly, that such a release did not destroy the assignees' right of action. *Carter v. Abbott*, 1 Barn. & Cres. 444.

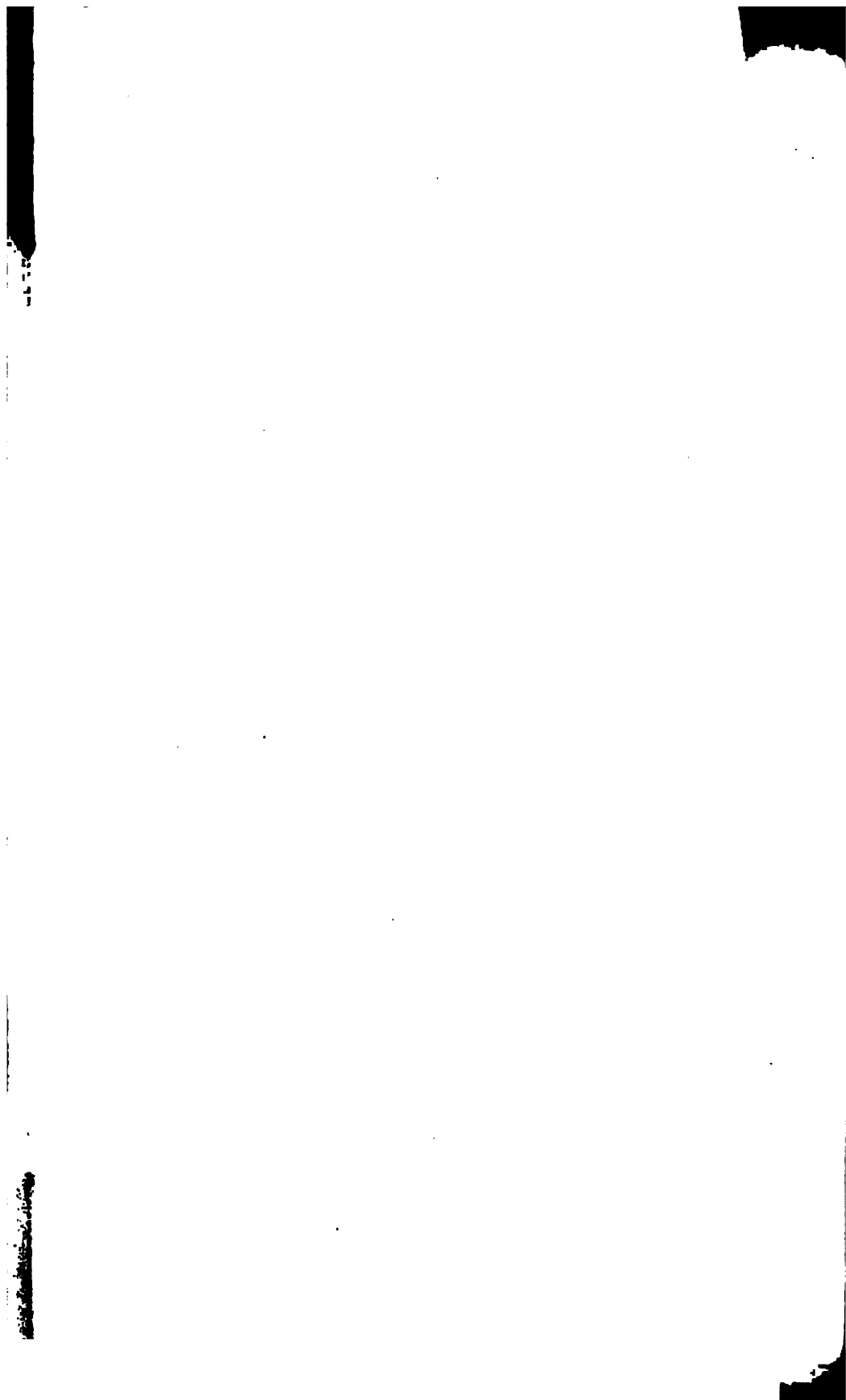
7. In an action by the assignees of a bankrupt who had obtained his certificate, and released the surplus of his estate, the bankrupt is a competent witness to prove the handwriting of the commissioners, in order to identify the proceedings taken under the commission against him. *Morgan, assignee of Jones v. Pryor*, 2 Barn. & Cres. 14.

8. In an action by the assignees of a bankrupt, no notice having been given of disputing the bankruptcy, it seems that the bankrupt himself, having obtained his certificate and released the surplus, is competent to prove that the proceedings produced are the proceedings under the commission. *Morgan, assignee of Jones, v. Price*, 3 Starkie, 58.

END OF THE FIRST VOLUME.







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